

1 - VOLUME 25 -

2 IN THE UNITED STATES DISTRICT COURT

3 IN AND FOR THE DISTRICT OF DELAWARE

4 - - -

5 UNITED STATES OF AMERICA, : CRIMINAL ACTION

6 :
Plaintiff, :

7 :
vs. :

8 :
DAVID R. GIBSON, ROBERT :

9 :
V.A. HARRA, WILLIAM :

10 :
NORTH, and KEVYN RAKOWSKI, :

11 :
Defendants. : NO. 15-23-RGA

12 - - -

13 Wilmington, Delaware
14 Monday, April 23, 2018
15 8:40 o'clock, a.m.
16 - - -

17 BEFORE: HONORABLE RICHARD G. ANDREWS, U.S.D.C.J., and a
jury

18 - - -

19 APPEARANCES:

20 LESLEY F. WOLF, ESQ.,
21 ROBERT F. KRAVETZ, ESQ. and
JAMIE M. McCALL, ESQ.
22 Assistant United States Attorneys

23 Counsel for Plaintiff

24 Valerie J. Gunning
Leonard A. Dibbs
25 Official Court Reporters

1 APPEARANCES (Continued) :

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3 **McCARTER & ENGLISH**
4 BY: STEVEN P. WOOD, ESQ.

5 -and-

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7 **ANDREW M. LAWLER P.C.**
8 BY: ANDREW W. LAWLER, ESQ.

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11 **Counsel for Defendant**
12 **Robert Harra**

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15 **DALTON & ASSOCIATES**
16 BY: BARTHOLOMEW DALTON, ESQ.

17 -and-

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25 **KROVATIN KLINGEMAN LLC**
26 BY: HENRY KLINGEMAN, ESQ.
27 (Newark, New Jersey)

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35 **Counsel for Defendant**
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11 Counsel for Defendant
David Gibson

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1 || PROCEEDINGS

6 THE COURT: All right. Good morning, everyone.

7 | Please be seated.

I just want to touch base on a couple things,

9 one of which is the parties should file whatever objections,

the e-mail correspondence over the weekend, everybody ought

to make a record of whatever it is they want to make a

12 record of.

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is, if they have any better estimate now than they did last

week as to how long they think their closing is going to

Be.

MR. KRAVETZ: It will take one break, I think.

hours.

21 THE COURT: Yes.

22 MR. KRAVETZ: Probably still around there.

THE COURT: Okay. All right. Fine. All right.

24 And so I will ask the jury to, even though I think they've
25 been pretty much sitting in the same seats these days, I

08:41:25 1 will ask them to maintain their seats and I will provide a
08:41:34 2 list of who is sitting where, but maybe not until after --
08:41:39 3 not right away.

08:41:40 4 The other thing is, in terms of my jury charge,
08:41:44 5 I don't have a good sense as to how long it's going to take
08:41:47 6 me, but I figured it would take somewhere between
08:41:49 7 one-and-a-half and two hours, and it's very likely I might
08:41:53 8 take a break at the halfway mark because there's a limit to
08:41:58 9 how long I can talk, which actually I can talk for longer
08:42:01 10 than the jury can listen, so we'll probably take at least a
08:42:07 11 short break to give everyone a chance to wake up.

08:42:12 12 All right. Are there any other issues to deal
08:42:14 13 with?

08:42:19 14 MS. WOLF: Your Honor, we actually seem to have
08:42:21 15 resolved all issues relating to admitted documents.

08:42:25 16 THE COURT: That's good. Thank you.

08:42:26 17 MS. WOLF: I have a slightly modified version of
08:42:29 18 the exhibit list, which just reflects redactions to
08:42:32 19 particular documents, and I will provide it to the clerk on
08:42:35 20 a break, Your Honor.

08:42:35 21 THE COURT: All right. That would be great.

08:42:38 22 MR. WOOD: Your Honor, my understanding is the
08:42:43 23 Government is resting without putting on a rebuttal case.
08:42:46 24 That matters to us because the Third Circuit suggests that
08:42:49 25 we need to renew our motions for judgment of acquittal after

08:42:52 1 that happens.

08:42:52 2 THE COURT: All right. So why don't we -- and
08:42:55 3 I'm glad you mentioned that, because though I had asked
08:42:57 4 about that, I do think the Government ought to -- that's
08:43:04 5 actually the first thing we ought to do, is have them rest
08:43:07 6 in front of the jury, and I will just take it that you've
08:43:10 7 made, renewed all your motions. And if you want to argue at
08:43:16 8 some later time, that's fine, but let's not do it --

08:43:19 9 MR. WOOD: Yes. All I was going to say is on
08:43:21 10 behalf of Harra, we do renew the motion and also ask the
08:43:24 11 Court to take into consideration any evidence after --

08:43:27 12 THE COURT: I assume that is on behalf of all
08:43:29 13 the defendants. If you want to put it on the record, that
08:43:31 14 would be good.

08:43:32 15 MR. NOWAK: Yes. That's on behalf of Mr. Gibson
08:43:32 16 as well, Your Honor.

08:43:36 17 MR. WILKS: And on behalf on Mr. North. Thank
08:43:39 18 you, Your Honor.

08:43:39 19 MR. KLINGEMAN: Just to make it clear, on behalf
08:43:40 20 of Ms. Rakowski, we're preserving any issues we've raised up
08:43:45 21 to and through the defense case.

08:43:48 22 THE COURT: Yes. The record will reflect, as
08:43:52 23 far as I'm concerned, you've made these after the Government
08:43:54 24 rests rather than before so you don't have to make them
08:43:57 25 again. What I expect is when the jury comes in, the

08:44:00 1 Government will say, we rest, and then I will start charging
08:44:04 2 the jury.

08:44:04 3 MR. KRAVETZ: And, Your Honor, I appreciated the
08:44:08 4 opportunity to confer with Mr. Klingeman over the weekend,
08:44:13 5 and I understand Mr. Klingeman is going to put this on the
08:44:15 6 record, but if you recall, we discussed at sidebar that
08:44:18 7 defendant Rakowski was not presenting the OTS Q&A evidence
08:44:24 8 and confirmed that with Mr. Klingeman.

08:44:26 9 THE COURT: Okay.

08:44:27 10 MR. KRAVETZ: Just because it might have
08:44:28 11 impacted whether we put a rebuttal case on or not or
08:44:31 12 requested to put on a rebuttal case. And also, we conferred
08:44:36 13 relating to Government Exhibit 524, which is the e-mail from
08:44:41 14 the desk file with the handwriting on top.

08:44:44 15 THE COURT: Right.

08:44:44 16 MR. KRAVETZ: And we discussed how at sidebar
08:44:47 17 Mr. Klingeman made certain representations about what he was
08:44:51 18 not going to say in closing relating to that document. It's
08:44:55 19 my understanding Mr. Klingeman is prepared to place that on
08:44:58 20 the record again just prior to us resting.

08:45:02 21 THE COURT: If it's already on the record once,
08:45:04 22 why do we need to place it on again?

08:45:07 23 MR. KRAVETZ: I'm content with that.

08:45:08 24 THE COURT: Mr. Klingeman?

08:45:09 25 MR. KLINGEMAN: I'm content with that as well.

08:45:11 1 THE COURT: Okay.

08:45:12 2 MR. KRAVETZ: Thank you, Your Honor.

08:45:13 3 THE COURT: All right. Anything else?

08:45:17 4 All right. Well, then, I will come back in in

08:45:21 5 15 minutes. Hopefully, the jury is all here, which I assume

08:45:24 6 they will be.

08:45:25 7 So you all can be seated. I just want to check

08:45:27 8 out one or two things, so just ignore me.

08:45:30 9 MR. KRAVETZ: Your Honor, will we get a copy of

08:45:32 10 the instructions to follow along with?

08:45:34 11 THE COURT: I e-mailed them to you at 8:30, and

08:45:37 12 unfortunately, if you want to follow along other than on

08:45:41 13 your computers, you need to start printing.

08:45:43 14 MR. KRAVETZ: Ms. Lothrop is all over it. We

08:45:46 15 have it.

08:45:46 16 THE COURT: Okay. I'm trying to save paper

08:46:04 17 here.

08:46:05 18 (Short recess taken.)

08:51:30 19 - - -

08:51:30 20 (Proceedings resumed after the short recess.)

09:02:31 21 THE COURT: All right. Good morning, again.

09:20:12 22 Please be seated.

09:20:13 23 I understand somebody wants to talk about the

09:20:14 24 jury instructions, so please tell me who and what it is your

09:20:17 25 problem is.

09:20:17 1 MS. WOLF: Your Honor, it's a minor point, and
09:20:19 2 actually, the parties are in agreement. On the bottom of
09:20:24 3 page 28, in the good faith instruction, at the bottom line,
09:20:28 4 the instruction originally read "and/or."

09:20:30 5 THE COURT: Yes.

09:20:31 6 MS. WOLF: It was changed just to read "or," but
09:20:34 7 the parties agree that it, that that line should
09:20:38 8 appropriately read "and/or."

09:20:40 9 THE COURT: So I'm correct to think the
09:20:45 10 circumstance of events was, the Government did a thing, said
09:20:50 11 "and/or." The defendant objected and said "or." The
09:20:54 12 Government didn't respond to that point.

09:20:56 13 That's where we got to that point?

09:20:57 14 MS. WOLF: And at the top, it was changed in two
09:20:58 15 places, and after talking to Mr. Nowak, at the top, it
09:21:02 16 appears not to alter the legal standard by just reading
09:21:05 17 "or," but as we read through it this morning in a final
09:21:09 18 run-through, it does appear, because certain of the counts
09:21:13 19 don't require a finding of willfulness, that it could
09:21:17 20 potentially create confusion.

09:21:18 21 THE COURT: Okay. Well, I am just going to read
09:21:21 22 in "and" there. Page 28.

09:21:24 23 What else?

09:21:25 24 MS. WOLF: That's it, Your Honor.

09:21:27 25 THE COURT: Oh.

09:21:29 1 MS. WOLF: Sorry to disappoint.

09:21:30 2 THE COURT: I was led to believe there were more

09:21:33 3 percolating matters.

09:21:36 4 MS. WOLF: No.

09:21:37 5 THE COURT: All right. Are we ready to go?

09:21:40 6 MR. KRAVETZ: Yes, Your Honor.

09:21:40 7 THE COURT: All right.

09:22:40 8 (The jury entered the courtroom.)

09:23:35 9 THE COURT: All right. Everyone may be seated.

09:23:37 10 Members of the jury, welcome back.

09:23:38 11 Have you followed my instructions since the last

09:23:41 12 time we saw you on Tuesday?

09:23:42 13 (The jury responds, "Yes.")

09:23:45 14 THE COURT: All right. Mr. Kravetz?

09:23:46 15 MR. KRAVETZ: Your Honor, the United States

09:23:47 16 rests.

09:23:47 17 THE COURT: All right. Thank you.

09:23:51 18 So, members of the jury, I'm about to start the

09:24:00 19 closing instructions, which actually, I will ask right now

09:24:05 20 that we hand out.

09:24:15 21 (The clerk handed copies of the jury

09:24:19 22 instructions to the jury.)

09:24:47 23 THE COURT: And before I start, I just want to

09:24:51 24 say that these instructions are really long, and I know

09:25:00 25 there are human limits to how long you can listen to me talk

09:25:03 1 and continue to absorb the information. So as you'll see,
09:25:09 2 you will be getting these, or you're going to have these
09:25:12 3 instructions in writing, and I expect that I will take a
09:25:18 4 break somewhere in the middle of this just to give you a
09:25:20 5 chance to become more alert. All right?

09:25:31 6 Members of the jury, you just heard and have
09:25:41 7 seen all the evidence in this case. Shortly, the parties
09:25:44 8 will have the opportunity to present their closing
09:25:46 9 arguments. The Government will argue first, then the
09:25:48 10 defendants will present their closing arguments, and
09:25:51 11 finally, the Government may argue in response or in rebut to
09:25:56 12 the defendants' arguments.

09:25:58 13 Closing arguments are designed to present to you
09:26:00 14 the parties' theories about what the evidence has shown and
09:26:03 15 what conclusions may be drawn from the evidence. Remember,
09:26:05 16 what is said in closing arguments is not evidence. You have
09:26:07 17 already heard and seen all the evidence in this case.

09:26:10 18 Before the parties present their closing
09:26:12 19 arguments, I will give you my final instructions concerning
09:26:14 20 the law that you must apply to the evidence in reaching your
09:26:17 21 verdict. Although the parties may mention points of law in
09:26:20 22 their closing arguments, the law that you must follow in
09:26:23 23 reaching your verdict is the law that I give you in my final
09:26:26 24 instructions. If there is any difference between what the
09:26:29 25 parties say about the law and what I tell you in my final

09:26:32 1 instructions, you must follow my instructions.

09:26:35 2 Members of the jury, you have seen and heard all
09:26:44 3 the evidence and the arguments of the lawyers. Now I will
09:26:47 4 instruct you on the law.

09:26:48 5 You have two duties as a jury. Your first duty
09:26:52 6 is to decide the facts from the evidence that you have heard
09:26:54 7 and seen in court during this trial. That is your job and
09:26:58 8 yours alone. I play no part in finding the facts. You
09:27:01 9 should not take anything I may have said or done during the
09:27:03 10 trial as indicating what I think of the evidence or what I
09:27:09 11 think about what your verdict should be.

09:27:12 12 Your second duty is to apply the law that I give
09:27:15 13 you to the facts. My role now is to explain to you the
09:27:18 14 legal principles that must guide you in your decisions. You
09:27:21 15 must apply my instructions carefully. Each of the
09:27:24 16 instructions is important, and you must apply all of them.
09:27:27 17 You must not substitute or follow your own notion or opinion
09:27:30 18 about what the law is or ought to be. You must apply the
09:27:35 19 law that I give to you, whether you agree with it or not.

09:27:38 20 Whatever your verdict, it will have to be
09:27:40 21 unanimous. All of you will have to agree on it or there
09:27:45 22 will be no verdict. In the jury room you will discuss the
09:27:47 23 case among yourselves, but ultimately each of you will have
09:27:50 24 to make up his or her own mind. This is a responsibility
09:27:54 25 that each of you has and that you cannot avoid.

09:27:57 1 During your deliberations, you must not
09:27:59 2 communicate with, receive any information from, or provide
09:28:02 3 any information to anyone by any means about this case. You
09:28:05 4 may not use any electronic device or media, such as the
09:28:08 5 telephone, a cellphone, smart phone, iPhone, Blackberry or
09:28:13 6 computer, the Internet, any Internet service, any text or
09:28:17 7 instant messaging service, any Internet chat room, blog, or
09:28:20 8 website such as Facebook, MySpace, LinkedIn, YouTube or
09:28:24 9 Twitter, to communicate to anyone any information about this
09:28:28 10 case, to receive any information about this case, or to
09:28:36 11 conduct any research about this case until I accept your
09:28:39 12 verdict. In other words, you cannot talk to anyone on the
09:28:42 13 phone, correspond with anyone, or electronically communicate
09:28:46 14 with anyone about this case. You can only discuss the case
09:28:49 15 in the jury room with your fellow jurors during
09:28:51 16 deliberations.

09:28:52 17 You may not use these electronic means to
09:28:55 18 investigate or communicate about the case because it is
09:28:57 19 important that you decide this case based solely on the
09:29:00 20 evidence presented in this courtroom. You are only
09:29:02 21 permitted to discuss the case with your fellow jurors during
09:29:05 22 deliberations because they have seen and heard the same
09:29:08 23 evidence you have. In our judicial system, it is important
09:29:11 24 that you are not influenced by anything or anyone outside of
09:29:16 25 this courtroom.

09:29:17 1 Perform these duties fairly and impartially. Do
09:29:21 2 not allow sympathy, prejudice, fear, or public opinion to
09:29:25 3 influence you. You should also not be influenced by
09:29:29 4 anyone's race, color, religion, national ancestry, or
09:29:36 5 gender, sexual orientation, profession, occupation,
09:29:40 6 celebrity, economic circumstances, or position in life or in
09:29:44 7 the community. The fact that the prosecution is brought in
09:29:47 8 the name of the United States of America does not entitle
09:29:49 9 the Government to any greater consideration than that when
09:29:51 10 you give to Mr. Gibson, Mr. Harra, Mr. North and Ms.
09:29:56 11 Rakowski.

09:29:56 12 The defendants Mr. Gibson, Mr. Harra, Mr. North,
09:30:04 13 and Ms. Rakowski are all charged with more than one offense;
09:30:11 14 each offense is charged in a separate count of the
09:30:14 15 indictment. I will explain to you in more detail shortly
09:30:16 16 which defendants are charged with which offenses. Before I
09:30:20 17 do that, however, I want to emphasize several things.

09:30:24 18 The number of offenses charged is not evidence
09:30:26 19 of guilt, and this should not influence your decision in any
09:30:31 20 way. Also, in our system of justice, guilt or innocence is
09:30:34 21 personal and individual. You must separately consider the
09:30:37 22 evidence against each defendant on each offense charged, and
09:30:40 23 you must return a separate verdict for each defendant for
09:30:43 24 each count. For each defendant and each count, you must
09:30:46 25 decide whether the Government has proven beyond a reasonable

09:30:49 1 doubt that a particular defendant is guilty of a particular
09:30:51 2 offense.

09:30:52 3 Your decision on any one defendant or any one
09:30:55 4 count, whether guilty or not guilty, should not influence
09:31:00 5 your decision on any of the other defendants or counts.

09:31:03 6 Each count and each defendant should be considered
09:31:05 7 separately.

09:31:06 8 The defendants Mr. Gibson, Mr. Harra, Mr. North,
09:31:13 9 and Ms. Rakowski have all pleaded not guilty to the offenses
09:31:18 10 charged. Each defendant is presumed to be innocent. Each
09:31:21 11 defendant started the trial with a clean slate, with no
09:31:23 12 evidence against him or her. The presumption of innocence
09:31:26 13 stays with each defendant unless and until the Government
09:31:28 14 has presented evidence that overcomes that presumption by
09:31:31 15 convincing you that the defendant you are considering is
09:31:33 16 guilty of the offense charged beyond a reasonable doubt.
09:31:35 17 The presumption of innocence requires that you find each
09:31:38 18 defendant not guilty, unless you are satisfied that the
09:31:41 19 Government has proved guilt of that defendant on the count
09:31:43 20 you are considering beyond a reasonable doubt.

09:31:45 21 The presumption of innocence means that
09:31:49 22 Mr. Gibson, Mr. Harra, Mr. North, and Ms. Rakowski have no
09:31:53 23 burden or obligation to present any evidence at all or to
09:31:56 24 prove that they are not guilty. The burden or obligation of
09:31:59 25 proof is on the Government to prove that the defendant is

09:32:01 1 guilty beyond a reasonable doubt, and this burden stays with
09:32:04 2 the Government throughout the trial.

09:32:05 3 In order for you to find Mr. Gibson, Mr. Harra,
09:32:09 4 Mr. North, and Ms. Rakowski guilty of any offense charged,
09:32:13 5 the Government must convince you that the defendant you are
09:32:15 6 considering is guilty beyond a reasonable doubt. That means
09:32:18 7 that the Government must prove each and every element of
09:32:21 8 each offense charged beyond a reasonable doubt. A defendant
09:32:23 9 may not be convicted based on suspicion or conjecture, but
09:32:28 10 only on evidence proving guilt beyond a reasonable doubt.

09:32:30 11 Proof beyond a reasonable doubt does not mean
09:32:34 12 proof beyond all possible doubt or to a mathematical
09:32:38 13 certainty. Possible doubts or doubts based on conjecture,
09:32:41 14 speculation, or hunch are not reasonable doubts. A
09:32:44 15 reasonable doubt is a fair doubt based on reason, logic,
09:32:48 16 common sense, or experience. It is a doubt that an ordinary
09:32:51 17 reasonable person has after carefully weighing all of the
09:32:54 18 evidence, and is a doubt of the sort that would cause him or
09:32:58 19 her to hesitate to act in matters of importance in his or
09:33:09 20 her own life. It may arise from the evidence, or from the
09:33:12 21 lack of evidence, or from the nature of the evidence.

09:33:14 22 If, having now heard all the evidence, you are
09:33:26 23 convinced that the Government proved each and every element
09:33:28 24 of an offense charged beyond a reasonable doubt with respect
09:33:31 25 to the defendant you are considering, you should return a

09:33:34 1 **verdict of guilty for that defendant on that count.**

09:33:36 2 **However, if you have a reasonable doubt about one or more of**

09:33:40 3 **the elements of an offense charged with respect to the**

09:33:42 4 **defendant you are considering, then you must return a**

09:33:45 5 **verdict of not guilty for that defendant on that count.**

09:33:47 6 **You must make your decision in this case based**

09:33:53 7 **only on the evidence that you saw and heard in the**

09:33:57 8 **courtroom. Do not let rumors, suspicions, or anything else**

09:34:00 9 **that you may have seen or heard outside of court influence**

09:34:03 10 **your decision in any way.**

09:34:05 11 **The evidence from which you are to find the**

09:34:07 12 **facts consist of the following:**

09:34:09 13 **The testimony of the witnesses.**

09:34:12 14 **Documents and other things received as exhibits.**

09:34:15 15 **And any fact or testimony that was stipulated;**

09:34:18 16 **that is, formally agreed to by the parties.**

09:34:21 17 **The following is not evidence:**

09:34:23 18 **The indictment.**

09:34:25 19 **Statements and arguments of the lawyers for the**

09:34:27 20 **parties in this case.**

09:34:28 21 **Questions by the lawyers and questions that I**

09:34:30 22 **might have asked.**

09:34:31 23 **Objections by lawyers, including objections in**

09:34:34 24 **which the lawyers stated facts.**

09:34:35 25 **Any testimony I struck or told you to disregard.**

09:34:38 1 And anything you may have seen or heard about
09:34:41 2 this case outside the courtroom.

09:34:42 3 You should use your common sense in weighing the
09:34:44 4 evidence. Consider it in light of your everyday experience
09:34:47 5 with people and events, and give it whatever weight you
09:34:50 6 believe it deserves.

09:34:50 7 As I told you in my preliminary instructions,

09:34:55 8 the Rules of Evidence control what can be received into
09:34:58 9 evidence. During the trial the lawyers objected when they
09:35:01 10 thought that evidence was offered that was not permitted by
09:35:04 11 the Rules of Evidence. These objections simply meant that
09:35:07 12 the lawyers were asking me to decide whether the evidence
09:35:09 13 should be allowed under the rules.

09:35:10 14 You should not be influenced by the fact that an
09:35:14 15 objection was made. You should also not be influenced by my
09:35:18 16 rulings on objections or any sidebar conferences you may
09:35:27 17 have overheard. When I overruled an objection, the question
09:35:30 18 was answered or the exhibit was received as evidence, and
09:35:32 19 you should treat that testimony or exhibit like any other.

09:35:35 20 When I sustained an objection, the question was
09:35:45 21 not answered or the exhibit was not received as evidence.

09:35:48 22 You must disregard the question or the exhibit entirely.
09:35:51 23 Do not think about or guess what the witness might have said
09:35:54 24 in answer to the question; do not think about or guess what
09:35:57 25 the exhibit might have shown. Sometimes a witness may have

09:36:00 1 already answered before a lawyer objected or before I ruled
09:36:03 2 on the objection. If that happened and if I sustained the
09:36:05 3 objection, you must disregard the answer that was given.

09:36:09 4 Also, if I ordered that some testimony or other
09:36:11 5 evidence be stricken or removed from the record, you must
09:36:14 6 disregard that evidence. When you are deciding this case,
09:36:21 7 you must not consider or be influence in any way by the
09:36:28 8 testimony or other evidence that I told you to disregard.

09:36:30 9 Although the lawyers may have called, or may
09:36:45 10 call your attention to certain facts or factual conclusions
09:36:47 11 that they thought were important, what the lawyers say is
09:36:50 12 not evidence and is not binding on you. It is your own
09:36:54 13 recollection and interpretation of the evidence that
09:36:55 14 controls your decision in this case. Also, do not assume
09:36:58 15 that anything I may have done or said during the trial, that
09:37:01 16 I have any opinion about any of the issues in this case, or
09:37:05 17 about what your verdict should be.

09:37:06 18 Two types of evidence may be used in this trial,
09:37:17 19 direct evidence and circumstantial evidence (or indirect)
09:37:21 20 evidence. You may use both types of evidence in reaching
09:37:25 21 your verdict.

09:37:26 22 Direct evidence is simply evidence which, if
09:37:28 23 believed, directly proves a fact. An example of direct
09:37:31 24 evidence occurs when a witness testifies about something the
09:37:33 25 witness knows from his or her own senses -- something the

09:37:37 1 witness has seen, touched, heard, or smelled.

09:37:40 2 Circumstantial evidence is evidence which, if
09:37:42 3 believed, indirectly proves a fact. It is evidence that
09:37:45 4 proves one or more facts from which you could reasonably
09:37:48 5 find or infer the existence of some other fact or facts. A
09:37:51 6 reasonable inference is simply a deduction or conclusion
09:37:53 7 that reason, experience, and common sense lead you to make
09:37:57 8 from the evidence. A reasonable inference is not a
09:38:00 9 suspicion or a guess. It is a reasoned, logical decision to
09:38:05 10 find that a disputed fact exists on the basis of another
09:38:07 11 fact.

09:38:08 12 For example, if someone walked into the
09:38:10 13 courtroom wearing a wet raincoat and carrying a wet
09:38:13 14 umbrella, that would be circumstantial or indirect evidence
09:38:15 15 from which you could reasonably find or conclude that it was
09:38:19 16 raining. You would not have to find that it was raining,
09:38:21 17 but you could.

09:38:21 18 Sometimes different inferences may be drawn from
09:38:24 19 the same set of facts. The Government may ask you to draw
09:38:26 20 one inference, and the defense may ask you to draw another.
09:38:30 21 You, and you alone, must decide what reasonable inferences
09:38:33 22 you will draw based on all the evidence and your reason,
09:38:35 23 experience and common sense.

09:38:37 24 You should consider all the evidence that is
09:38:41 25 presented in this trial, direct and circumstantial. The law

09:38:44 1 makes no distinction between the weight that you should give
09:38:47 2 to either direct or circumstantial evidence. It is for you
09:38:49 3 to decide how much weight to give any evidence.

09:38:57 4 Many of you have taken notes during the course
09:39:00 5 of the trial.

09:39:01 6 If you have taken notes, you may use your notes
09:39:05 7 only as an aid to your own independent recollection of the
09:39:08 8 evidence. Your notes are not evidence, and they are not
09:39:11 9 entitled to any greater weight than the actual recollection
09:39:13 10 of each juror as to what the evidence actually is. It is
09:39:16 11 your recollection of the evidence, not your notes, which
09:39:19 12 should control during your deliberations. If you have not
09:39:22 13 taken notes, you should rely upon your own independent
09:39:25 14 recollection of the proceedings and not be unduly influenced
09:39:28 15 by the notes of other jurors. Similarly, none of you may
09:39:32 16 use the mere fact that you took notes to try and influence
09:39:35 17 any other juror.

09:39:36 18 I emphasize that notes are not entitled to any
09:39:39 19 greater weight than the memory or impression of each juror
09:39:42 20 as to what the testimony may have been.

09:39:43 21 It is the duty of an attorney to object when
09:39:51 22 testimony or evidence is offered which the attorney believes
09:39:53 23 is not properly admissible. Counsel also have the right and
09:39:56 24 duty to ask the Court to make rulings of law. All of those
09:39:59 25 questions of law must be decided by the Court. You should

09:40:02 1 not show any prejudice against an attorney or his or her
09:40:06 2 client because the attorney objected to the admissibility
09:40:08 3 of evidence, or asked the Court for a ruling on the law.

09:40:11 4 My rulings on the admissibility of evidence
09:40:14 5 do not indicate any opinion about the weight or effect of
09:40:17 6 such evidence. You are the sole judges of the credibility
09:40:19 7 of all witnesses and the weight and effect of all of the
09:40:22 8 evidence.

09:40:32 9 In certain instances evidence was admitted
09:40:39 10 only for a particular purpose and not generally for all
09:40:42 11 purposes.

09:40:42 12 For example, from time to time, I permitted a
09:40:44 13 witness to testify about what another person said out of
09:40:47 14 court, and at the time of such testimony I instructed you
09:40:50 15 that the out-of-court statements were being admitted for a
09:40:55 16 limited purpose. Similarly, from time to time I admitted an
09:40:58 17 exhibit into evidence for a limited purpose. For the
09:41:01 18 limited purpose for which the testimony or exhibit was
09:41:04 19 received, you may give it such weight as you feel it
09:41:07 20 deserves. You may not, however, use such testimony or
09:41:13 21 exhibits for any other purpose other than the limited
09:41:15 22 purpose for which it was admit.

09:41:17 23 Although the Government is required to prove the
09:41:22 24 defendant guilty beyond a reasonable doubt, the Government
09:41:23 25 is not required to present all possible evidence related to

09:41:26 1 the case or to produce all possible witnesses that might
09:41:28 2 have some knowledge about the facts of the case.

09:41:31 3 In this case, the defendants presented evidence
09:41:34 4 and produced witnesses. The defendants are not required to
09:41:37 5 present all possible evidence related to the case or to
09:41:40 6 produce all possible witnesses who might have some knowledge
09:41:42 7 about the facts of the case.

09:41:43 8 The Government and the defendant have agreed
09:41:50 9 that certain facts contained in a stipulation signed by the
09:41:52 10 parties are true. You should therefore treat these facts as
09:41:55 11 having been proved. You are not required to do so, however,
09:41:58 12 since you are the sole judge of the facts.

09:42:07 13 As I stated in my preliminary instructions at
09:42:10 14 the beginning of the trial, in deciding what the facts are,
09:42:14 15 you must decide what testimony you believe and what
09:42:16 16 testimony you do not believe. You are the sole judges of
09:42:23 17 the credibility of the witnesses. Credibility refers to
09:42:24 18 whether a witness is worthy of belief: Was the witness
09:42:29 19 truthful? Was the witness' testimony accurate? You may
09:42:32 20 believe everything a witness says, or only part of it, or
09:42:35 21 none of it.

09:42:36 22 You may decide whether to believe a witness
09:42:38 23 based on his or her behavior and manner of testifying, the
09:42:42 24 explanations the witness gave, and all the other evidence in
09:42:46 25 the case, just as you would in any important matter where

09:42:49 1 **you are trying to decide if a person is truthful,**
09:42:52 2 **straightforward, and accurate in his or her recollection.**
09:42:54 3 **In deciding the question of credibility, remember to use**
09:42:56 4 **your common sense, your good judgment, and your experience.**
09:42:59 5 **In deciding what to believe, you may consider a**
09:43:01 6 **number of factors:**
09:43:06 7 **The opportunity and ability of the witness to**
09:43:09 8 **see or hear or know the things about which the witness**
09:43:14 9 **testified.**
09:43:14 10 **The quality of the witness' knowledge,**
09:43:15 11 **understanding, and memory.**
09:43:17 12 **The witness' appearance, behavior, and manner**
09:43:20 13 **while testifying.**
09:43:20 14 **Whether the witness has an interest in the**
09:43:22 15 **outcome of the case or any motive, bias, or prejudice.**
09:43:25 16 **Any relation the witness may have with a party**
09:43:27 17 **in the case and any effect the verdict may have on the**
09:43:30 18 **witness.**
09:43:30 19 **Whether the witness said or wrote anything**
09:43:33 20 **before trial that was different from the witness' testimony**
09:43:35 21 **in court.**
09:43:35 22 **Whether the witness' testimony was consistent or**
09:43:37 23 **inconsistent with other evidence that you believe.**
09:43:40 24 **And other factors that bear on whether the**
09:43:50 25 **witness should be believed.**

09:43:51 1 **Inconsistencies or discrepancies in a witness'**
09:43:54 2 **testimony or between the testimony of different witnesses**
09:43:56 3 **may or may not cause you to disbelieve a witness' testimony.**
09:43:59 4 **Two or more persons witnessing an event may simply see or**
09:44:02 5 **hear it differently. Mistaken recollection, like failure to**
09:44:13 6 **recall, is a common human experience. In weighing the**
09:44:16 7 **effect of an inconsistency, you should also consider whether**
09:44:19 8 **it was about a matter of importance or an insignificant**
09:44:22 9 **detail. You should also consider whether the inconsistency**
09:44:25 10 **was innocent or intentional.**

09:44:26 11 **You are not required to accept testimony even if**
09:44:30 12 **the testimony was not contradicted and the witness was not**
09:44:33 13 **impeached. You may decide that the witness is not worthy of**
09:44:36 14 **belief because of the witness' bearing and demeanor, or**
09:44:39 15 **because of the inherent improbability of the testimony, or**
09:44:42 16 **for other reasons that are sufficient to you.**

09:44:45 17 **Based on your own judgment about the**
09:44:48 18 **believability of a witness, you can attach to that witness'**
09:44:51 19 **testimony the importance or weight that you think it**
09:44:54 20 **deserves.**

09:44:55 21 **The weight of the evidence to prove a fact does**
09:44:57 22 **not necessarily depend on the number of witnesses who**
09:44:59 23 **testified or the quantity of evidence that was presented.**
09:45:02 24 **What is more important than numbers or quantity is how**
09:45:05 25 **believable the witnesses were, and how much weight you think**

09:45:07 1 their testimony deserves.

09:45:09 2 You have heard the testimony of law enforcement
09:45:16 3 officers. The fact that a witness is employed as a law
09:45:18 4 enforcement officer does not mean that his or her testimony
09:45:22 5 necessarily deserves more or less consideration or greater
09:45:25 6 or lesser weight than that of any other witness. At the
09:45:29 7 same time, it is quite legitimate for defense counsel to try
09:45:31 8 to attack the believability of a law enforcement witness on
09:45:35 9 the ground that his or her testimony may be colored by a
09:45:38 10 personal or professional interest in the outcome of the
09:45:41 11 case. You must decide, after reviewing all the evidence,
09:45:43 12 whether you believe the testimony of the law enforcement
09:45:46 13 witness and how much weight, if any, it deserves.

09:45:53 14 You have heard the testimony that Joseph
09:45:56 15 Terranova has made a plea agreement with the Government.

09:45:58 16 His testimony was received in evidence and may
09:46:01 17 be considered by you. The Government is permitted to
09:46:03 18 present the testimony of someone who has reached a plea
09:46:06 19 agreement with the Government in exchange for his testimony,
09:46:09 20 but you should consider the testimony of Mr. Terranova with
09:46:11 21 great care and caution.

09:46:13 22 In evaluating Mr. Terranova's testimony, you
09:46:15 23 should consider this factor along with the others I have
09:46:18 24 called to your attention. Whether or not Mr. Terranova's
09:46:22 25 testimony may have been influenced by the plea agreement is

09:46:25 1 for you to determine. You may give his testimony such
09:46:27 2 weight as you think it deserves.

09:46:29 3 You must not consider Mr. Terranova's guilty
09:46:35 4 plea as any evidence of any defendant's guilt. His decision
09:46:37 5 to plead guilty was a personal decision about his own guilt.
09:46:41 6 Such evidence is offered only to allow you to assess the
09:46:44 7 credibility of the witness. You may consider
09:46:48 8 Mr. Terranova's guilty plea only for this purpose.

09:46:50 9 You have heard the testimony of certain
09:46:56 10 witnesses. You have also heard that before this trial,
09:46:59 11 certain witnesses made statements that may be different from
09:47:02 12 other witness' testimony in this trial. It is up to you to
09:47:07 13 determine whether these statements were made and whether
09:47:08 14 they were different from the witness' testimony in this
09:47:10 15 trial. These earlier statements were brought to your
09:47:13 16 attention only to help you decide whether to believe the
09:47:16 17 witness' testimony here at trial. You cannot use it as
09:47:19 18 proof of the truth of what the witness said in the earlier
09:47:24 19 statement. You can only use it as one way of evaluating the
09:47:27 20 witness' testimony in this trial.

09:47:30 21 The Rules of Evidence ordinarily do not permit
09:47:37 22 witnesses to state their own opinions about important
09:47:39 23 questions in a trial, but there are exceptions to these
09:47:41 24 rules.

09:47:41 25 In this case, you heard from Donald Walker as an

09:47:45 1 expert in his field. As such, Mr. Walker was permitted to
09:47:49 2 offer opinions in that field and the reason for those
09:47:52 3 opinions.

09:47:52 4 The opinions that this witness stated should
09:47:56 5 receive whatever weight you think appropriate, given all the
09:47:59 6 other evidence in the case. In weighing the opinion
09:48:02 7 testimony, you may consider the witness' qualifications, the
09:48:05 8 reasons for the witness' opinions, and the reliability of
09:48:09 9 information supporting the witness' testimony, as well as
09:48:12 10 the other factors discussed in these instructions for
09:48:15 11 weighing the testimony of witnesses. You may disregard an
09:48:18 12 opinion entirely if you decide that the opinion was not
09:48:21 13 based on sufficient knowledge, skill, experience, training,
09:48:24 14 or education. You may also disregard an opinion if you
09:48:27 15 conclude that the reasons given in support of the opinion
09:48:29 16 are not sound, or if you conclude that the opinion is not
09:48:32 17 supported by the facts shown by the evidence, or if you
09:48:34 18 think that the opinion is outweighed by other evidence.

09:48:36 19 Defendants Harra, Gibson, North and Rakowski did
09:48:43 20 not testify in this case. A defendant has an absolute
09:48:47 21 constitutional right not to testify. The burden of proof
09:48:50 22 remains with the prosecution throughout the entire trial and
09:48:54 23 never shifts to the defendant. A defendant is never
09:48:56 24 required to prove that he or she is innocent. You must not
09:48:59 25 attach any significance to the fact that the defendant did

09:49:02 1 not testify. You must not draw any adverse inference
09:49:05 2 against him or her because he or she did not take the
09:49:08 3 witness stand. Do not consider, for any reason at all, the
09:49:10 4 fact that the defendant did not testify. Do not discuss the
09:49:12 5 fact during your deliberations or let it influence your
09:49:15 6 decision in any way.

09:49:16 7 A defendant who is an officer, director, or
09:49:27 8 employee of a corporation is not criminally responsible for
09:49:29 9 the alleged acts of other employees or subordinates merely
09:49:33 10 because the defendant held a position or positions with the
09:49:35 11 bank. Therefore, it is not enough for the Government to
09:49:38 12 prove that certain activity occurred at Wilmington Trust to
09:49:42 13 demonstrate that the defendant knew of the activity or was
09:49:44 14 responsible for that activity. Nor is it enough for the
09:49:47 15 Government to prove that one or more of the alleged
09:49:49 16 wrong-doers reported to the defendant. In addition, you may
09:49:55 17 not infer that the defendant, based solely on his or her
09:49:58 18 position at Wilmington Trust, had any knowledge of any
09:50:01 19 particular activity.

09:50:02 20 Furthermore, it is not enough for the Government
09:50:05 21 to prove that the defendant should have known about any
09:50:08 22 particular activity. You have heard reference at times
09:50:26 23 during the trial to Wilmington Trust internal policies
09:50:27 24 and procedures. While you should consider thoughtfully
09:50:30 25 evidence as to whether one or more of the defendants may

09:50:33 1 or may not have violated internal policies or procedures,
09:50:36 2 such a violation, by itself, is not a violation of criminal
09:50:38 3 law.

09:50:39 4 To the extent that the Government alleges
09:50:41 5 that one or more of the defendants may have violated a
09:50:43 6 bank policy or procedure, I instruct you that, whatever
09:50:46 7 you may determine from the evidence, a defendant who has
09:50:50 8 merely violated a bank policy or procedure or acted contrary
09:50:54 9 to a bank policy or procedure is not guilty of any federal
09:50:57 10 crime.

09:50:57 11 To convict a defendant of a crime, the
09:50:59 12 Government must prove beyond a reasonable doubt that each
09:51:02 13 element of the criminal statutes, which I will describe for
09:51:04 14 you, has been met.

09:51:05 15 You may, however, consider evidence of knowing
09:51:07 16 and intentional violations of internal policies and
09:51:09 17 procedures, as you would other evidence in determining
09:51:11 18 whether any of the defendants devised a scheme to defraud,
09:51:15 19 acted knowingly, willfully, or with the intent to defraud.
09:51:19 20 It is entirely up to you what weight to give this evidence.

09:51:22 21 You have heard reference at times during the
09:51:36 22 trial to regulations, regulatory guidance, and guidelines,
09:51:39 23 including SEC guidance, schedule RC-N instructions, and
09:51:43 24 generally accepted accounting principles (to as GAAP).
09:51:49 25 While you should consider thoughtfully evidence as to

09:51:52 1 whether one or more of the defendants may or may not have
09:51:55 2 violated a regulation or GAAP, you are instructed that a
09:51:58 3 violation of regulations, regulatory guidelines, and
09:52:01 4 guidance, including SEC guidance, schedule RC-N
09:52:05 5 instructions, and GAAP, is not, by itself, a violation of
09:52:08 6 criminal law.

09:52:08 7 To the extent that the Government alleges that
09:52:10 8 one or more of the defendants may have violated a regulation
09:52:14 9 or GAAP, I instruct you that, whatever you may determine
09:52:17 10 from the evidence, a defendant who has merely violated a
09:52:20 11 regulation or GAAP or acted contrary to regulatory guidance
09:52:24 12 or guidelines is not guilty of any federal crime. To
09:52:28 13 convict a defendant of a crime, the Government must prove
09:52:30 14 beyond a reasonable doubt that each element of the criminal
09:52:32 15 statutes, which I will describe for you, has been met.

09:52:35 16 You may, however, consider evidence of knowing
09:52:37 17 and intentional violations of federal banking and securities
09:52:40 18 laws, regulations and rules, as you would other evidence in
09:52:43 19 determining whether any of the defendants devised a scheme
09:52:45 20 to defraud, acted knowingly, willfully, or with the intent
09:52:48 21 to defraud. It is entirely up to you what weight to give
09:52:52 22 this evidence.

09:52:53 23 You will note that the indictment charges that
09:53:01 24 the offense was committed on or about or in or around a
09:53:05 25 certain date. The Government does not have to prove with

09:53:08 1 certainty the exact date of each alleged offense. It is
09:53:11 2 sufficient if the Government proves beyond a reasonable
09:53:13 3 doubt that the offense was committed on a date reasonably
09:53:16 4 near the date alleged.

09:53:24 5 The offenses charged in the indictment require
09:53:32 6 that the Government prove beyond a reasonable doubt that the
09:53:38 7 defendant you are considering acted knowingly, willfully,
09:53:41 8 and/or with intent to defraud.

09:53:43 9 These mental states apply to the various
09:53:45 10 offenses I will define shortly. I will define the mental
09:53:54 11 states for you now, and as I read through the elements of
09:53:57 12 the offenses, I will tell you when a particular mental state
09:54:00 13 applies.

09:54:00 14 To act knowingly means that the Government must
09:54:05 15 prove beyond a reasonable doubt that the defendant you are
09:54:07 16 considering was conscious and aware of the nature of his or
09:54:10 17 her actions and of the surrounding facts and circumstances,
09:54:13 18 as specified in the definition of the offenses charged. In
09:54:17 19 deciding whether the defendant acted knowingly, you may
09:54:20 20 consider evidence about what the defendant said, what the
09:54:22 21 defendant did and failed to do, how the defendant acted, and
09:54:25 22 all the other facts and circumstances shown by the evidence
09:54:28 23 that may prove what was in the defendant's mind at that
09:54:32 24 time.

09:54:32 25 To act willfully means the Government must prove

09:54:39 1 beyond a reasonable doubt that the defendant you are
09:54:40 2 considering knew his or her conduct was unlawful and
09:54:43 3 intended to do something that the law forbids. That is,
09:54:46 4 to find that the defendant acted willfully, you must find
09:54:49 5 that the evidence proved beyond a reasonable doubt that
09:54:51 6 the defendant acted with a purpose to disobey or disregard
09:54:54 7 the law. Willfully does not, however, require proof that
09:54:58 8 the defendant had any evil motive or bad purpose other than
09:55:02 9 the purpose to disobey or disregard the law. Willfully
09:55:06 10 does not require proof that the actor knew of the existence
09:55:09 11 and meaning of the statute making his or her conduct
09:55:12 12 criminal.

09:55:13 13 To act with an intent to defraud means to act
09:55:17 14 knowingly and with the intention or the purpose to deceive
09:55:19 15 or to cheat. In considering whether a defendant acted with
09:55:21 16 an intent to defraud, you may consider, among other things,
09:55:32 17 whether the defendant acted with a desire or purpose to
09:55:34 18 bring about some gain or benefit to himself or herself or
09:55:38 19 someone else or with a desire or purpose to cause some loss
09:55:42 20 to someone.

09:55:42 21 You may consider both direct evidence and
09:55:45 22 circumstantial evidence, including a defendant's words or
09:55:47 23 conduct and other facts and circumstances, in deciding
09:55:49 24 whether the defendant you are considering had the required
09:55:52 25 knowledge and criminal intent.

09:55:53 1 As I just explained, the offenses charged in the
09:56:14 2 indictment require proof that the defendant acted knowingly,
09:56:16 3 willfully, and/or with intent to defraud. If you find that
09:56:20 4 a defendant acted in good faith, that would be a complete
09:56:23 5 defense to the offense you are considering, because good
09:56:25 6 faith on the part of the defendant would be inconsistent
09:56:28 7 with his or her acting knowingly, willfully, or with that
09:56:37 8 intent to defraud.

09:56:42 9 For example, a person acts in good faith when he
09:56:45 10 or she has an honestly held belief, opinion, or
09:56:48 11 understanding that not all matured loans had to be reported
09:56:52 12 as past due, even though the belief, opinion, or
09:56:55 13 understanding turns out to be inaccurate or incorrect.
09:57:03 14 Thus, in this case if the defendant you are considering made
09:57:08 15 an honest mistake or had an honest misunderstanding about
09:57:12 16 whether all loans that were matured had to be reported as
09:57:15 17 past due, then the defendant did not act knowingly,
09:57:20 18 willfully, or with the intent to defraud.

09:57:25 19 In considering whether a defendant made an
09:57:26 20 honest mistake or had an honest misunderstanding about
09:57:31 21 whether mature loans had to be reported as past due loans,
09:57:35 22 you may consider the defendant's actions and beliefs in
09:57:38 23 relation to the term past due loan.

09:57:40 24 The defendants do not have the burden of proving
09:57:43 25 good faith. Good faith is a complete defense because it is

09:57:48 1 inconsistent with the requirement of the offenses charged,
09:57:52 2 that the defendant acted knowingly, willfully, and/or with
09:57:55 3 the intent to defraud. As I have told you, it is the
09:57:58 4 Government's burden to prove beyond a reasonable doubt each
09:58:03 5 element of the offenses, including the mental state element.
09:58:06 6 In deciding whether the Government proved that the defendant
09:58:10 7 you are considering acted with the required intent or,
09:58:13 8 instead, whether the defendant acted in good faith, you
09:58:16 9 should consider all of the evidence presented in the that
09:58:19 10 may bear on the defendant's state of mind.

09:58:24 11 The next sentence I'm going to read, I'm going
09:58:26 12 to add in a word that is not in the written version, and try
09:58:31 13 to make a note of it, because the way I'm going to read it
09:58:34 14 is the correct way, not the way it's actually written.

09:58:37 15 If you find for any reason that the Government
09:58:39 16 has not proved beyond a reasonable doubt that the defendant
09:58:42 17 acted knowingly, willfully, and/or with the intent to
09:58:48 18 defraud, you must find the defendant not guilty of the
09:58:53 19 particular offense you are considering. And just to be
09:58:55 20 clear, I said "and/or" instead of "or."

09:59:01 21 Motive is not an element of the offenses with
09:59:05 22 which the defendants are charged. Proof of motive is not
09:59:09 23 required to convict. Evidence of a defendant's motive may,
09:59:12 24 however, help you find that defendant's intent.

09:59:16 25 Intent and motive are different consents.

09:59:18 1 Motive is what prompts a person to act. Intent refers
09:59:22 2 only to the state of mind with which the particular act is
09:59:25 3 done.

09:59:31 4 As I will explain in more detail, Counts 1, 7 to
09:59:37 5 10, 11 to 13 and 16 allege the defendants made or caused to
09:59:44 6 be made false statements of various call reports, or as to
09:59:49 7 Count 16, a monthly regulatory report, that Wilmington Trust
09:59:54 8 filed with the Federal Reserve.

09:59:57 9 The Government alleges that the defendants made
09:59:59 10 or caused to be made a false statement regarding the bank's
10:00:02 11 loans that were past due 90 days or more. The specific
10:00:08 12 information that banks are required to report in call
10:00:11 13 reports are set forth in the document entitled "Instruction
10:00:15 14 For Preparation of Consolidated Reports of Condition and
10:00:19 15 Income," which I will now refer to as the call report
10:00:22 16 instructions.

10:00:24 17 Applicable to this case, the call report
10:00:28 18 instructions contain a section entitled general
10:00:32 19 instructions. The general instructions state that banks are
10:00:36 20 required to prepare and file the call reports in accordance
10:00:39 21 with these instructions. All reports shall be prepared in a
10:00:43 22 consistent manner. The general instructions state further
10:00:47 23 that questions and requests for interpretations of matters
10:00:51 24 appearing in any part of these instructions should be
10:00:54 25 addressed to the bank's primary federal bank's supervisory

10:00:57 1 agency, i.e., the Federal Reserve Bank, the OCC, or the
10:01:03 2 FDIC.

10:01:05 3 According to the general instructions,
10:01:08 4 regardless of whether a bank requested interpretation of a
10:01:11 5 matter appearing in these instructions, when a bank's
10:01:14 6 primary federal bank supervisory agency's interpretation of
10:01:18 7 the instruction differs from the bank's interpretation, the
10:01:22 8 supervisory agency may require the bank to prepare its call
10:01:26 9 report in accordance with the agency's interpretation and to
10:01:30 10 amend previously submitted reports.

10:01:32 11 Although the call report instructions are
10:01:36 12 designed to conform to United States generally accepted
10:01:40 13 accounting principles, or GAAP, when a bank's supervisory
10:01:46 14 agency's interpretation of how GAAP should be applied to a
10:01:49 15 specified event or transaction or series of related events
10:01:53 16 or transactions differs from the bank's interpretation, the
10:01:57 17 supervisory agency may require the bank to reflect the
10:02:01 18 events or transactions in its call report in accordance with
10:02:05 19 the agency's interpretation and to amend previously
10:02:08 20 submitted reports.

10:02:09 21 The reporting of past due loans is considered by
10:02:13 22 the instructions listed in schedule RC-N, past due and
10:02:20 23 nonaccrual loans, leases, or other assets. The schedule
10:02:23 24 RC-N instructions contain a definition of past due which
10:02:27 25 states, the past due status of a loan or other asset should

10:02:31 1 be determined in accordance with its contractual repayment
10:02:37 2 terms. The definition further states that grace periods
10:02:39 3 allowed by the bank after a loan or other asset technically
10:02:43 4 has become past due but before the imposition of late
10:02:46 5 charges are not to be taken into account in determining past
10:02:49 6 due status. In addition, the definition states that loans
10:02:52 7 are to be reported as past due when either interest or
10:02:55 8 principal is unpaid under five circumstances.

10:02:58 9 The third and fourth circumstances outlined
10:03:03 10 under the definition relate to single payment notes and debt
10:03:15 11 securities. The third circumstance states: Single payment
10:03:19 12 and demand notes, debt securities, and other assets
10:03:22 13 providing for the payment of interest as stated intervals
10:03:25 14 are to be reported as past due after one interest payment is
10:03:28 15 due and unpaid for 30 days.

10:03:30 16 The fourth circumstance outlined under the
10:03:32 17 definition covers the past due status of loans that are past
10:03:35 18 due because they have matured; that is, the loans are
10:03:38 19 overdue for principal repayment under the terms of a
10:03:41 20 contractual loan agreement. That circumstance states the
10:03:44 21 following: Single payment notes, debt securities, and other
10:03:48 22 assets providing for the payment of interest at maturity are
10:03:51 23 to be reported as past due after maturity if interest or
10:03:53 24 principal remaining unpaid for third days or more.

10:04:00 25 You have heard testimony relating to certain

10:04:02 1 reports that Wilmington Trust Corporation filed with the
10:04:04 2 Securities and Exchange Commission or SEC. These reports
10:04:08 3 include Form 10-Q and Form 10-K. These reports are
10:04:11 4 documents that publicly traded companies, like Wilmington
10:04:16 5 Trust Corporation, must file with the SEC. These reports
10:04:18 6 include financial statements that present a company's
10:04:20 7 operating results and cash flows for a particular financial
10:04:22 8 reporting period. A Form 10-Q relates to a quarterly
10:04:26 9 financial reporting period. A Form 10-K relates to an
10:04:29 10 annual financial reporting period. A company's Form 10-Q
10:04:45 11 and Form 10-K cannot, and need not, provide all the material
10:04:50 12 information that is available about the company. That is
10:04:53 13 not the function of a Form 10-Q or a Form 10-K. These
10:04:56 14 reports, taken as a whole, must disclose the information
10:04:59 15 that is required under the securities laws.

10:05:01 16 Counts 1 through 6 and 11 through 13 allege that
10:05:11 17 the defendants falsely reported Wilmington Trust
10:05:15 18 Corporation's quantity of accruing loans that were past due
10:05:20 19 90 days or more in the bank's SEC forms 10-Q for the third
10:05:26 20 quarter of 2009 and first quarter of 2010 and in the bank's
10:05:29 21 Form 10-K for 2009.

10:05:32 22 During the period of the indictment, SEC
10:05:34 23 regulation S-K set forth the requirements applicable to
10:05:40 24 the content of the non-financial statement portions of
10:05:42 25 periodic reports filed with the Securities and Exchange

10:05:45 1 Commission.

10:05:45 2 Item 303 of regulation S-K set forth the
10:05:50 3 information that securities registrants were required to
10:05:53 4 discuss in the Management's discussion and analysis of
10:05:56 5 financial condition and results of operations section
10:05:58 6 of periodic filings. Item 303 directs the attention of
10:06:03 7 bank holding companies, such as Wilmington Trust
10:06:05 8 Corporation, to the information called for in SEC industry
10:06:08 9 Guide three.

10:06:08 10 SEC Industry Guide 3 governs statistical
10:06:11 11 disclosures by bank holding companies. Section 3 of Guide
10:06:15 12 3, entitled loan portfolio contains a subsection entitled
10:06:20 13 risk elements, which addresses the reporting of past due
10:06:23 14 loans in SEC management discussion and analysis disclosures.
10:06:26 15 The past due section states that bank holding companies
10:06:29 16 must, as of the end of each reported period, state
10:06:32 17 separately the aggregate of accruing loans which are
10:06:34 18 contractually past due 90 days or more as to principal or
10:06:38 19 interest payments.

10:06:39 20 During the period set forth in the indictment,
10:06:45 21 federal securities regulations required public companies to
10:06:49 22 file financial statements in accordance with generally
10:06:57 23 accepted accounting principles, or GAAP. GAAP required
10:07:01 24 that a securities registrant such as Wilmington Trust
10:07:03 25 provide a summary of significant accounting policies in

10:07:07 1 its footnotes to financial statements contained in periodic
10:07:11 2 SEC filings.

10:07:12 3 GAAP further provided that an entity's summary
10:07:15 4 of significant accounting policies for financing receivable
10:07:20 5 shall include "the policy for determining past due or
10:07:39 6 delinquent status (that is, whether past due status is based
10:07:42 7 on how recently payments have been received or contractual
10:07:45 8 terms) ."

10:07:48 9 The defendants are charged in the indictment
10:07:54 10 with committing the following offenses:

10:07:56 11 Conspiracy to defraud the United States, commit
10:07:58 12 securities fraud, and make false statements to regulators
10:08:04 13 (Count 1).

10:08:05 14 Securities fraud (Count 2).

10:08:08 15 Making false statements in documents required to
10:08:10 16 be filed with the Securities and Exchange Commission
10:08:12 17 (Counts 4 and 6).

10:08:14 18 Making false statements to the Securities and
10:08:16 19 Exchange Commission and the Federal Reserve (Counts 5 and 11
10:08:20 20 to 16).

10:08:21 21 And making false entries in banking records
10:08:25 22 (Counts 7 to 10).

10:08:28 23 In addition, Defendant David Gibson has been
10:08:33 24 charged with making false certifications in financial
10:08:35 25 reports (Counts 17 to 19).

10:08:38 1 By the way, just so you aren't wondering later
10:08:41 2 on, there is no Count 3.

10:08:45 3 As I explained at the beginning of trial, an
10:08:47 4 indictment is just the formal way of specifying the exact
10:08:51 5 crimes the defendants are accused of committing. An
10:08:54 6 indictment is simply a description of the charges against a
10:08:57 7 defendant. It is an accusation only. An indictment is not
10:08:59 8 evidence of anything, and you should not give any weight to
10:09:02 9 the fact that anyone has been indicted in making your
10:09:05 10 decision in this case.

10:09:06 11 In order to find a defendant guilty of any of
10:09:09 12 the charged offenses, you must all find that the Government
10:09:12 13 proved each element of that offense beyond a reasonable
10:09:14 14 doubt, as I will explain in more detail shortly.

10:09:17 15 Count 1 of the indictment charges that from in
10:09:24 16 or around October 2009, through in or around November 2010,
10:09:29 17 in the District of Delaware, Defendants Robert Harra, David
10:09:32 18 Gibson, Kevyn Rakowski, and William North agreed or
10:09:37 19 conspired with one or more other persons, including Brian
10:09:44 20 Bailey and Joseph Terranova, to defraud the United States
10:09:47 21 and to commit offenses against the United States, namely
10:09:49 22 securities fraud, making false statements in quarterly and
10:09:53 23 annual reports filed with the Securities and Exchange
10:09:58 24 Commission, and making false statements to the Securities
10:10:05 25 and Exchange Commission and the Federal Reserve.

10:10:06 1 Count 1 further charges that, to further the
10:10:08 2 objective of the conspiracy, at least one member of the
10:10:10 3 conspiracy committed at least one overt act, as alleged in
10:10:14 4 the indictment.

10:10:14 5 It is a federal crime for two or more persons to
10:10:17 6 agree or conspire to defraud the United States or to commit
10:10:21 7 any offense against the United States, even if they never
10:10:23 8 actually achieve their objective. A conspiracy is a kind of
10:10:26 9 criminal partnership.

10:10:27 10 In order for you to find the defendant you are
10:10:30 11 considering guilty of conspiracy to defraud the United
10:10:32 12 States or to commit an offense against the United States,
10:10:34 13 you must find that the Government proved beyond a reasonable
10:10:37 14 doubt each of the following four elements.

10:10:39 15 First: That two or more persons agreed to
10:10:44 16 defraud the United States or to commit an offense against
10:10:47 17 the United States, as charged in the indictment. Defraud
10:10:50 18 the United States means to obstruct or interfere with one of
10:10:55 19 the United States Government's lawful functions, by deceit,
10:11:01 20 craft, trickery, or dishonest means. Because each of the
10:11:05 21 offenses against the United States alleged in the conspiracy
10:11:07 22 count are also alleged as separate offenses, I will explain
10:11:10 23 the elements of those alleged offenses against the United
10:11:17 24 States to you shortly.

10:11:18 25 Second: That the defendant was a party to or

10:11:22 1 member of that agreement.

10:11:23 2 Third: That the defendant you are considering
10:11:25 3 joined the agreement or conspiracy knowing of its objective
10:11:28 4 to defraud the United States or to commit an offense against
10:11:31 5 the United States and intending to join together with at
10:11:34 6 least one other alleged conspirator to achieve one of the
10:11:43 7 objectives; that is, that the defendant and at least one
10:11:48 8 other alleged conspirator shared a unity of purpose and the
10:11:52 9 intent to achieve a common goal or objective, to defraud the
10:11:55 10 United States or to commit an offense against the United
10:11:58 11 States.

10:11:58 12 And, fourth: That at some time during the
10:12:02 13 existence of the agreement or conspiracy, at least one of
10:12:04 14 its members performed an overt act in order to further the
10:12:08 15 objective of the agreement.

10:12:09 16 I will explain each of these elements in more
10:12:13 17 detail.

10:12:13 18 The first element of the crime of conspiracy is
10:12:22 19 the existence of an agreement. The Government must prove
10:12:24 20 beyond a reasonable doubt that two or more persons knowingly
10:12:27 21 and intentionally arrived at a mutual understanding or
10:12:30 22 agreement, either spoken or unspoken, to work together to
10:12:33 23 achieve an overall objective of the conspiracy, to defraud
10:12:37 24 the United States or to commit an offense against the United
10:12:40 25 States, to commit securities fraud, to make false statements

10:12:43 1 in quarterly and annual reports filed with the Securities
10:12:47 2 and Exchange Commission, and to make false statements to
10:12:49 3 the Securities and Exchange Commission and the Federal
10:12:53 4 Reserve.

10:12:53 5 The Government does not have to prove the
10:12:56 6 existence of a formal or written agreement, or an express
10:13:00 7 oral agreement spelling out the details of the
10:13:02 8 understanding. The Government also does not have to prove
10:13:05 9 that all the members of the conspiracy directly met, or
10:13:07 10 discussed between themselves their unlawful objectives, or
10:13:10 11 agreed to all the details, or agreed to what the means were
10:13:16 12 by which the objectives would be accomplished. The
10:13:19 13 Government is not required to prove that all people named in
10:13:22 14 the indictment were, in fact, parties to the agreement, or
10:13:24 15 that all members of the alleged conspiracy were named, or
10:13:27 16 that all members of the conspiracy are known. What the
10:13:30 17 Government must proof beyond a reasonable doubt is that two
10:13:33 18 or more persons in some way or manner arrived at some type
10:13:36 19 of agreement, mutual understanding, or meeting of the minds
10:13:39 20 to try to accomplish a common and unlawful objective.

10:13:43 21 You may consider both direct evidence and
10:13:45 22 circumstantial evidence in deciding whether the Government
10:13:47 23 has proved beyond a reasonable doubt that an agreement or
10:13:49 24 mutual understanding existed. You may find the existence of
10:13:52 25 a conspiracy based on reasonable inferences drawn from the

10:13:54 1 actions and statements of the alleged members of the
10:13:56 2 conspiracy, from the circumstances surrounding the scheme,
10:13:59 3 and from evidence of related facts and circumstances which
10:14:02 4 prove that the activities of the participants in a
10:14:04 5 criminal venture could not have been carried out except
10:14:10 6 as the result of a preconceived agreement, scheme, or
10:14:13 7 understanding.

10:14:14 8 The indictment charges a conspiracy to commit
10:14:16 9 several unlawful objectives, i.e., to defraud the United
10:14:20 10 States, to commit securities fraud, to make false statements
10:14:22 11 in reports filed with the SEC, and to make false statements
10:14:26 12 to the SEC and federal regulators. The Government does
10:14:28 13 not have to prove that the alleged conspirators agreed to
10:14:31 14 commit all of these unlawful objectives. The Government,
10:14:34 15 however, must prove that they agreed to commit at least
10:14:36 16 one of the unlawful objectives, and you must unanimously
10:14:40 17 agree on which unlawful objective. You cannot find a
10:14:43 18 defendant guilty of conspiracy unless you unanimously agree
10:14:46 19 that the same federal crime was the objective of the
10:14:48 20 conspiracy. It is not enough if some of you agreed that one
10:14:51 21 of the charged crimes was the objective of the conspiracy
10:14:54 22 and others agree that a different crime was the objective of
10:14:57 23 the conspiracy.

10:14:57 24 If you find that a criminal agreement or
10:15:04 25 conspiracy existed, then in order to find a defendant guilty

10:15:07 1 of conspiracy, you must also find that the Government proved
10:15:10 2 beyond a reasonable doubt that the defendant knowingly and
10:15:12 3 intentionally joined that agreement or conspiracy during its
10:15:15 4 existence. The Government must prove that the defendant you
10:15:18 5 are considering knew the goal or objective of the agreement
10:15:20 6 or conspiracy and voluntarily joined it during its
10:15:25 7 existence, intending to achieve the common goal or objective
10:15:27 8 and to work together with the other alleged conspirators
10:15:31 9 toward that goal or objective.

10:15:33 10 The Government need not prove that the defendant
10:15:44 11 you are considering knew everything about the conspiracy or
10:15:46 12 that he or she knew everyone involved in it, or that he or
10:15:49 13 she was a member from the beginning. The Government also
10:15:52 14 does not have to prove that the defendant played a major or
10:15:55 15 substantial role in the conspiracy.

10:15:56 16 You may consider both direct evidence and
10:15:59 17 circumstantial evidence in deciding whether the defendant
10:16:01 18 joined the conspiracy, knew of its criminal objective, and
10:16:03 19 intended to further the objective. Evidence which shows
10:16:06 20 that the defendant only knew about the conspiracy, or only
10:16:09 21 associated with other members of the conspiracy, or was only
10:16:25 22 present when it was discussed or when a crime was committed,
10:16:29 23 is not sufficient to prove that the defendant was a member
10:16:32 24 of the conspiracy even if the defendant approved of what was
10:16:35 25 happening or did not object to it. Likewise, evidence

10:16:39 1 showing that the defendant may have done something that
10:16:44 2 happened to help a conspiracy does not necessarily prove
10:16:46 3 that he or she joined the conspiracy. You may, however,
10:16:49 4 consider this evidence, with all the other evidence, in
10:16:52 5 deciding whether the Government proved beyond a reasonable
10:16:54 6 doubt that the defendant joined the conspiracy.

10:16:55 7 In order to find the defendant you are
10:17:03 8 considering guilty of conspiracy, you must find that the
10:17:06 9 Government proved beyond a reasonable doubt that the
10:17:08 10 defendant joined the conspiracy knowing of one of its
10:17:10 11 objectives and intending to help further or achieve that
10:17:12 12 objective.

10:17:13 13 That is, the Government must prove, as to the
10:17:17 14 defendant you are considering: One, that the defendant knew
10:17:21 15 of an objective or goal of the conspiracy; two, that the
10:17:26 16 defendant joined the conspiracy intending to help further or
10:17:29 17 achieve that goal or objective; and, three, that the
10:17:33 18 defendant and at least one other alleged conspirator shared
10:17:36 19 a unity of purpose toward that objective or goal.

10:17:39 20 To convict a defendant of conspiracy to defraud
10:17:41 21 the United States, the Government must prove that the
10:17:43 22 defendant acted with intent to defraud. I have previously
10:17:46 23 instructed you on the definition of intent to defraud.

10:17:49 24 To convict a defendant of conspiracy for
10:17:51 25 committing an identified offense against the United States,

10:17:53 1 the Government must prove whatever mental state is required
10:17:56 2 for conviction of the underlying substantive offenses. The
10:17:59 3 Government has alleged three possible underlying substantive
10:18:02 4 offenses in Count 1: To commit securities fraud, to make
10:18:10 5 false statements in reports filed with the SEC, and to make
10:18:13 6 false statements to the SEC and federal regulators, which I
10:18:16 7 will explain in more detail. Each of these offenses
10:18:20 8 requires that the Government proved beyond a reasonable
10:18:23 9 doubt that the defendant committed the offense knowingly,
10:18:25 10 willfully, and/or with intent to defraud, which I defined
10:18:29 11 for you earlier. I will tell you which mental states apply
10:19:00 12 to the underlying substantive offenses.

10:19:02 13 With regard to the fourth element of
10:19:08 14 conspiracy -- over acts -- the Government must prove
10:19:12 15 beyond a reasonable doubt that during the existence of the
10:19:16 16 conspiracy, at least one member of the conspiracy performed
10:19:19 17 at least one of the overt acts described in the indictment,
10:19:22 18 for the purpose of furthering or helping to achieve the
10:19:26 19 objective of the conspiracy.

10:19:27 20 The indictment alleges the following overt acts
10:19:29 21 committed in furtherance of the conspiracy:

10:19:30 22 Wilmington Trust Corporation filed with the
10:19:41 23 SEC a Form 10-Q for the third quarter of 2009 and the first
10:19:46 24 and second quarters of 2010, as well as a Form 10-K for
10:19:50 25 2009, with each SEC report materially misrepresenting the

10:19:53 1 bank's quantity of loans that were past due for 90 or more
10:19:57 2 days.

10:19:57 3 Mr. Gibson electronically signed Wilmington
10:20:01 4 Trust's SEC Form 10-Q for the third quarter of 2009 and the
10:20:04 5 first and second quarters of 2010, as well as a Form 10-K
10:20:08 6 for 2009.

10:20:09 7 Mr. Harra and Ms. Rakowski electronically signed
10:20:12 8 Wilmington Trust's 2009 Form 10-K.

10:20:14 9 Mr. Gibson also electronically signed a
10:20:25 10 certification in Wilmington Trust's SEC Form 10-Q for the
10:20:34 11 third quarter of 2009 and the first and second quarters of
10:20:37 12 2010, as well as a Form 10-K for 2009 stating that the
10:20:42 13 information contained in each of the reports fairly
10:20:46 14 presented in all material respects the financial condition
10:20:49 15 and results of operation of Wilmington Trust.

10:20:52 16 Mr. Gibson and Mr. Harra further certified
10:20:55 17 falsely in Wilmington Trust's 2009 Form 10-K that the bank's
10:21:01 18 internal controls over financial reporting were effective,
10:21:06 19 when each was aware that the bank had experienced
10:21:08 20 significant issues with the tracking, proper extension, and
10:21:17 21 reporting of matured loans.

10:21:18 22 Wilmington Trust Company filed call reports with
10:21:21 23 the Federal Reserve for each of the third and fourth
10:21:23 24 quarters of 2009, and the first and second quarters of 2010,
10:21:28 25 which each materially misrepresented the bank's quantity of

10:21:31 1 loans that were past due for 90 days or more.

10:21:36 2 Mr. Gibson electronically signed Wilmington
10:21:39 3 Trust's call reports for each of the third and fourth
10:21:42 4 quarters of 2009 and the first and second quarters of
10:21:45 5 2010.

10:21:48 6 Wilmington Trust Corporation filed monthly
10:21:52 7 regulatory reports with the Federal Reserve for each monthly
10:21:55 8 period between September 2009 and March 2010, which, each
10:21:58 9 materially misrepresented the bank's quantity of loans that
10:22:02 10 were past due for 90 or more days.

10:22:05 11 Mr. North supervised the preparation and
10:22:07 12 approval of the past due loan amounts in the bank's monthly
10:22:10 13 delinquency report, knowing that such conduct would cause
10:22:13 14 the bank to materially misrepresent its quantity of loans
10:22:16 15 that were past due for 90 or more days in each of the public
10:22:19 16 reports filed in the following periods: Wilmington Trust's
10:22:28 17 SEC reports for the third quarter of 2009, year-end 2009,
10:22:31 18 and the first quarter of 2010; WTC's call report for each of
10:22:39 19 the third and fourth quarters of 2009, and the first quarter
10:22:42 20 of 2010; and Wilmington Trust's monthly regulatory reports
10:22:47 21 for each monthly period between September 2009 and
10:22:50 22 March 2010.

10:22:51 23 Ms. Rakowski supervised the preparation and
10:22:55 24 approval of the past due reports knowing that the false past
10:22:59 25 due loan information included therein would cause the bank

1 to materially misrepresent its quantity of loans that were
2 past due for 90 or more days in each of the same following
3 periods: Wilmington Trust's SEC reports for the third
4 quarter of 2009, year-end 2009, and the first quarter of
5 2010; WTC's call reports for each of the third and fourth
6 quarters of 2009, and the first quarter of 2010; and
7 Wilmington Trust's monthly regulatory reports for each
8 monthly period between September 2009 and March 2010.

The Government does not have to prove that all
of these acts were committed or any of these acts were
themselves illegal. Also, the Government does not have to
prove that a defendant personally committed any of the overt
acts. The Government must proof beyond a reasonable doubt
that at least one member of the conspiracy committed at
least one of the overt acts alleged in the indictment and
committed it during the time that the conspiracy existed,
for the purpose of furthering or helping to achieve an

10:24:43 1 objective of the conspiracy. You must unanimously agree on
10:24:46 2 the overt act that was committed.

10:24:51 3 The Government is not required to prove that any
10:24:48 4 members of conspiracy were successful in achieving any or
10:24:51 5 all of the objectives in the conspiracy.

10:24:54 6 You may find a defendant guilty of conspiracy if
10:24:56 7 you find that the Government proved beyond a reasonable
10:25:01 8 doubt the elements I explained, even if you find that the
10:25:02 9 Government did not prove that any of the conspirators
10:25:06 10 actually committed any other offense.

10:25:08 11 Conspiracy is a criminal offense separate from
10:25:10 12 the offenses that were the objective of the conspiracy.
10:25:13 13 Conspiracy is complete without the commission of those
10:25:17 14 offenses in the

10:25:22 15 As I have instructed you, Count I charges the
10:25:27 16 alleged conspirators entered into an agreement to knowingly
10:25:27 17 accomplish four unlawful objectives.

10:25:29 18 The Government need not prove that the alleged
10:25:33 19 conspirators entered into an agreement to knowingly
10:25:35 20 accomplish all four unlawful objectives.

10:25:38 21 However, the Government must prove beyond a
10:25:39 22 reasonable doubt that the alleged conspirators entered into
10:25:42 23 an agreement to knowingly accomplish at least one of the
10:25:45 24 unlawful objectives charged in Count I.

10:25:47 25 All twelve of you must find the same unlawful

10:25:51 1 objective was agreed upon by the alleged co-conspirators.
10:25:55 2 It is not enough to convict that some of you find that the
10:25:58 3 Government has proven an agreement to knowingly accomplish
10:26:01 4 one unlawful objective, while others of you find that the
10:26:05 5 Government has proven to accomplish a different unlawful
10:26:08 6 objective.

10:26:08 7 If you do not all agree unanimously, that the
10:26:12 8 Government proven beyond a reasonable doubt an agreement to
10:26:18 9 knowingly accomplish the same unlawful objective, you must
10:26:18 10 return a verdict of not guilty for all defendants with
10:26:21 11 respect to Count I.

10:26:22 12 Members of the jury, I think we're about halfway
10:26:29 13 through the instructions. We're going to take a five-minute
10:26:34 14 break so I can rest my throat.

10:26:38 15 And also so you all can walk to the jury room
10:26:44 16 and do whatever you may do to try to make yourself ELERT.
10:26:48 17 You all seem to be pretty ELERT. It's a hard thing to do.

10:26:54 18 But in any event, we'll take a short break.

10:26:56 19 Take the jury out, please.

10:27:23 20 (Jury left the courtroom.)

10:27:25 21 THE COURT: All right.

10:27:35 22 So it really will be a short break. We'll be
10:27:39 23 back in an about five minutes.

10:27:41 24 (A break was held.)

10:34:09 25 THE COURT: All right.

10:34:11 1 **We're ready to continue. Let's get the jury.**

10:34:17 2 **(At this time the jury entered the courtroom.)**

10:35:50 3 **THE COURT: All right.**

10:35:51 4 **Members of the jury, welcome back, everyone.**

10:35:52 5 **You may be seated.**

10:35:53 6 I have put in a request to try to lower the

10:35:56 7 **temperature in here.**

10:35:58 8 **Members of the jury, I will now instruct you on**

10:36:01 9 **the substantive securities fraud count, Count II.**

10:36:04 10 Count II of the Indictment alleges that from on

10:36:07 11 or about December 2009, up to on or about February 2010, Mr.

10:36:13 12 Gibson, Mr. Harra, Mr. North, and Ms. Rakowski committed

10:36:16 13 **securities fraud.**

10:36:17 14 As to each defendant you are considering, the

10:36:20 15 Government must prove each of the following elements beyond

10:36:22 16 a reasonable doubt:

10:36:22 17 One, that the defendant you are considering

10:36:27 18 executed, or attempted to execute, a scheme or artifice.

10:36:31 19 a, to defraud persons in connection with the

10:36:33 20 **securities of Wilmington Trust Corporation or,**

10:36:36 21 b, to obtain, by means of materially false and

10:36:39 22 fraudulent pretences, representations, and promises, or by

10:36:42 23 statements containing material omissions, money and property

10:36:45 24 in connection with the purchase and sale of the securities

10:36:47 25 **of Wilmington Trust Corporation.**

10:36:48 1 **Two, that the defendant you are considering**
10:36:51 2 **acted knowingly and with the intent to defraud; and**

10:36:55 3 **Three, that Wilmington Trust Corporation is an**
10:36:58 4 **issuer of a class of securities registered under Section 12**
10:37:01 5 **of the Securities Exchange Act of 1934 (15 U.S.C. Section**
10:37:09 6 **781) or that it is required to file a report under Section**
10:37:12 7 **15(d) of the Securities Exchange Act of 1934 (15 U.S.C.**
10:37:12 8 **Section 78o(d).**

10:37:18 9 **A scheme or artifice to defraud in the context**
10:37:21 10 **of Count II is any plan, device, or course of action to**
10:37:25 11 **obtain money or property by false or fraudulent pretenses.**

10:37:30 12 **The Government must prove beyond a reasonable**
10:37:32 13 **doubt that the scheme contemplated or intended some harm to**
10:37:35 14 **property rights of another.**

10:37:36 15 **The requirement is satisfied if you find either**
10:37:41 16 **the Government proved beyond a reasonable doubt that the**
10:37:43 17 **defendant intended that other individuals would make**
10:37:46 18 **investment decisions based on materially fraudulent**
10:37:49 19 **misrepresentations.**

10:37:50 20 **You should ignore the word "either" there.**

10:37:50 21 **The first element that the Government must prove**
10:38:01 22 **beyond a reasonable doubt is that the defendant you are**
10:38:03 23 **considering executed a scheme to either:**

10:38:04 24 **One, defraud investors by making materially**
10:38:09 25 **false or fraudulent statements in connection with the**

10:38:21 1 securities of Wilmington Trust Corporation, or
10:38:23 2 Two, fraudulently obtained money and property in
10:38:26 3 connection with the purchase and sale of the securities of
10:38:29 4 Wilmington Trust Corporation.
10:38:29 5 With respect to one, the Government must prove
10:38:32 6 beyond a reasonable doubt that the defendant you are
10:38:34 7 considering executed, or attempted to execute a scheme or
10:38:37 8 artifice to defraud investors by making materially false or
10:38:41 9 fraudulent statements in connection with the securities of
10:38:44 10 Wilmington Trust Corporation.
10:38:45 11 With respect to two, the Government must prove
10:38:49 12 beyond a reasonable doubt that the defendant you are
10:38:51 13 considering executed, or attempted to execute a scheme or
10:38:53 14 artifice to obtain money by means of materially false or
10:38:57 15 fraudulent pretenses, representations, or promises in
10:38:59 16 connection with the purchase of sales of the securities of
10:39:02 17 Wilmington Trust Corporation.
10:39:03 18 To find the that Government has proven the first
10:39:06 19 element of Count II beyond a reasonable doubt with respect
10:39:08 20 to the defendant you are considering, you must be unanimous
10:39:12 21 that the Government has proven beyond a reasonable doubt
10:39:15 22 that the defendant executed, or attempted to execute either
10:39:18 23 one, a scheme to defraud investors by making materially
10:39:22 24 false or fraudulent statements in connection with the
10:39:24 25 securities of Wilmington Trust Corporation, or, two, a

10:39:27 1 scheme or artifice to obtain money by means of materially
10:39:30 2 false or fraudulent pretenses, representations, or promises
10:39:34 3 in connection with the purchase or sale of the securities of
10:39:36 4 Wilmington Trust Corporation, as discussed above.

10:39:44 5 It is not enough to convict if some of you find
10:39:47 6 that the Government has proven securities fraud under, one,
10:39:51 7 with respect to the defendant you are considering, while
10:39:53 8 others of you find that the Government has proven securities
10:39:56 9 fraud under, two, with respect to that defendant.

10:39:59 10 If you cannot unanimously agree, you must return
10:40:02 11 a verdict of not guilty on Count II for the defendant you
10:40:06 12 are considering.

10:40:06 13 To establish a scheme to defraud, the Government
10:40:21 14 must prove beyond a reasonable doubt that the defendant
10:40:24 15 knowingly devised or willfully participated in a scheme to
10:40:28 16 defraud any person in connection with the securities of
10:40:30 17 Wilmington Trust Corporation.

10:40:31 18 A scheme is merely a plan for accomplishing an
10:40:35 19 object.

10:40:35 20 Thus, a scheme to defraud is any plan, device,
10:40:39 21 or course of action to deprive another of money or property
10:40:42 22 by means of materially false or fraudulent pretenses,
10:40:46 23 representations, or promises reasonably calculated to
10:40:49 24 deceive persons of average prudence.

10:40:52 25 In this case, the indictment alleges that the

1 scheme to defraud was carried out by making materially false
2 or fraudulently statements, representations, claims or
3 documents. The representations which the indictment
4 charges were made as part of the scheme to defraud in Count
5 II are contained in Wilmington Trust's SEC Form 10-K for
6 2009, Government Exhibit 1.

7 It is sufficient that the Government prove
8 beyond a reasonable doubt that one or more of the false or
9 fraudulent material misrepresentations in Wilmington Trust
10 Corporation's SEC Form 10-K for 2009, were made in
11 furtherance of the alleged scheme to defraud.

12 However, you cannot convict the defendant unless
13 you all agree unanimously as to at least one of the material
14 representations.

15 A statement, representation, claim, or document
16 is false if it is untrue when made, and if the person making
17 the statement, representations, claim or document or causing
18 it to be made knew it was untrue at the time it was made.

19 A representation or statement is fraud if it was
20 known to be false and was made with the intention to
21 deceive.

22 In addition, deceitful statements and
23 half-truths, or the expression of an opinion not honestly
24 entertained may constitute false or fraudulent statements.

25 The arrangement of the words, or the

10:42:19 1 circumstances in which they are used, may convey a false and
10:42:24 2 deceptive appearance.

10:42:24 3 The deception need not be premised upon spoken
10:42:28 4 or written words alone. If there is deception, the manner
10:42:31 5 in which it was accomplished is immaterial.

10:42:33 6 The false or fraudulent representations must
10:42:36 7 relate to a material fact or matter.

10:42:38 8 A fact is material if there is a substantial
10:42:41 9 likelihood that a reasonable investor would have viewed the
10:42:44 10 information as having significantly altered the total mix of
10:42:48 11 information available.

10:42:48 12 This means that if you find that a particular
10:42:51 13 statement of facts was false, you must determine whether
10:42:55 14 there was a substantial likelihood that the statement was
10:42:59 15 one that a reasonable investor would have viewed as having
10:43:02 16 significantly altered the total mix of information available
10:43:04 17 in making his or her decision to invest in Wilmington Trust
10:43:08 18 Corporation securities.

10:43:08 19 In order to establish a scheme to defraud, or to
10:43:11 20 fraudulently obtain money or property, the Government must
10:43:14 21 also prove that the alleged scheme contemplated depriving
10:43:19 22 another of money or property.

10:43:21 23 However, the Government is not required to prove
10:43:24 24 that a particular defendant originated the scheme to
10:43:27 25 defraud.

10:43:28 1 Furthermore, it is not necessary that the
10:43:32 2 Government prove that a defendant actually realized any gain
10:43:34 3 from the scheme or that any intended victim actually
10:43:38 4 suffered any loss. Although, whether or not the scheme
10:43:41 5 actually succeeded is really not the question, you may
10:43:46 6 consider whether it succeeded in determining whether the
10:43:49 7 scheme existed.

10:43:50 8 If you find that the Government has proved
10:43:52 9 beyond a reasonable doubt that the scheme to defraud charged
10:43:54 10 in the indictment did exist and that the defendant knowingly
10:43:59 11 devised or participated in the overall scheme charged in the
10:44:05 12 indictment, you should then consider the second element.

10:44:07 13 I instruct you as a matter of law that the term
10:44:11 14 "security" includes stock.

10:44:18 15 I instruct you that Wilmington Trust Corporation
10:44:20 16 was an issuer with a class of securities registered under
10:44:23 17 Section 12 of the Securities Exchange Act 1934, or that was
10:44:28 18 required to file reports under Section 15(d) of the
10:44:31 19 Securities Exchange Act of 1934, during the period set forth
10:44:35 20 in the indictment.

10:44:38 21 A fraud scheme is employed in connection with
10:44:41 22 the purchase or sale of a security if the alleged false or
10:44:44 23 fraudulent statement coincides with the securities
10:44:47 24 transaction. That is, there's a nexus between a materially
10:44:50 25 false or fraudulent statement and the purchase or sale of a

10:44:54 1 security.

10:44:54 2 A false or fraudulent statement is material to
10:44:58 3 the purchase or sale of a security, if the there was a
10:45:01 4 substantial likelihood that the truthful disclosure of the
10:45:05 5 alleged false statements regarding past due loans would have
10:45:09 6 been viewed by a reasonable investor as having significantly
10:45:13 7 altered the total mix of information available to that
10:45:16 8 investor.

10:45:20 9 The final element that the Government must prove
10:45:23 10 beyond a reasonable doubt is that the defendant acted with
10:45:26 11 intent to defraud.

10:45:27 12 I have previously instructed you on the
10:45:28 13 definition of intent to defraud.

10:45:30 14 In considering whether a defendant acted with an
10:45:33 15 intent to defraud, you may consider, among other things,
10:45:36 16 whether that defendant acted with a desire to or purpose to
10:45:39 17 bring about some gain or benefit to the himself or herself,
10:45:42 18 or someone else with a purpose to cause some loss to
10:45:46 19 someone.

10:45:46 20 You may also find an intent to defraud if you
10:45:49 21 conclude that a defendant made or caused to be made a
10:45:53 22 material misstatement of fact made with reckless disregard
10:45:56 23 for the truth.

10:45:56 24 In order to establish that a defendant committed
10:46:04 25 securities fraud by making any false or fraudulently

10:46:07 1 representations to obtain money or property in connection
10:46:10 2 with a security, the Government must prove beyond a
10:46:13 3 reasonable doubt the following elements:

10:46:14 4 First, the defendant employed a device, scheme,
10:46:17 5 or artifice:

10:46:18 6 Second, with the purpose to obtain, by means of
10:46:23 7 false or fraudulent pretenses, representations, or promises
10:46:26 8 any money or property:

10:46:28 9 Third, the false or fraudulent pretenses,
10:46:31 10 representations, or promises were made in connection with a
10:46:33 11 security:

10:46:33 12 Fourth, the security was registered under a
10:46:36 13 national exchange or required to file a report under the
10:46:39 14 Securities Exchange Act; and

10:46:41 15 Five, the defendant acted with an intent to
10:46:43 16 defraud.

10:46:43 17 I have previously instructed you as to what
10:46:46 18 constitutes a scheme, device, or artifice. The definition
10:46:49 19 of a security, the definition of a false or fraudulent. The
10:46:52 20 fact that the Wilmington Trust's securities were registered
10:46:55 21 under a national exchange are required to file reports under
10:47:00 22 the Securities Exchange Act. Definition of a materiality in
10:47:03 23 the context of securities fraud and the definition of intent
10:47:05 24 to fraud.

10:47:06 25 Securities fraud by means of false or fraudulent

10:47:10 1 pretenses, representations, or promises requires that you
10:47:13 2 must agree that a defendant engaged in a specific fraud or
10:47:16 3 fraudulent pretenses, representations, or promises.

10:47:19 4 The Government is not required to prove that all
10:47:22 5 of the statements alleged are materially false. Proof that
10:47:24 6 a single statement is materially false is sufficient to
10:47:27 7 prove a defendant's guilt as to Count II.

10:47:30 8 However, each of you must agree with each of the
10:47:34 9 other jurors that the same item is materially false. Unless
10:47:39 10 you unanimously agree that the Government has proved the
10:47:42 11 same item was materially false beyond a reasonable doubt,
10:47:46 12 you must find the defendant is not guilty regarding that
10:47:50 13 count.

10:47:50 14 The only alleged false statements that you may
10:47:55 15 consider in connection with the securities fraud by means of
10:47:57 16 false or fraudulent pretenses, representations, or promises
10:48:01 17 with respect to Count II are the following statements on the
10:48:05 18 SEC Form 10-K for 2009, submitted by Wilmington Trust
10:48:10 19 Corporation, Government Exhibit 1.

10:48:11 20 The Government contends that the following
10:48:13 21 statements on page 55 of the SEC Form 10-K for 2009 were
10:48:17 22 false:

10:48:17 23 One, the table listing the amount of particular
10:48:20 24 categories of loans past due 90 days or more;
10:48:23 25 Two, the ratio of loans past due 90 days to

10:48:26 1 total loans outstanding;

10:48:27 2 And, three, the discussion of accruing loans

10:48:29 3 past due 90 days or more.

10:48:32 4 The three statements identified above on page 55

10:48:34 5 of the Wilmington Trust Corporation SEC Form 10-K for 2009,

10:48:38 6 are the only statements that you may consider with respect

10:48:41 7 to the alleged scheme to obtain money or property by means

10:48:45 8 of materially false or fraudulently pretenses,

10:48:48 9 representations, or promises.

10:48:48 10 The Government need not prove that each

10:48:51 11 statement was false. However, the Government must prove

10:48:54 12 beyond a reasonable doubt that at least one of these

10:48:56 13 statement was materially false and that it was made in

10:48:58 14 furtherance of the alleged scheme to obtain money or

10:49:02 15 property by means of materially false or fraudulent

10:49:06 16 pretenses, representations, or promises.

10:49:07 17 Furthermore, all twelve of you must agree that

10:49:09 18 the statement was materially false. It is not enough if

10:49:13 19 some of you find that the Government has proven one

10:49:15 20 materially false statement, while others of you find that

10:49:19 21 the Government has proven another false statement.

10:49:22 22 If you do not all agree unanimously that the

10:49:26 23 Government has proven the same specific materially false

10:49:33 24 statement beyond a reasonable doubt, you must return a

10:49:34 25 verdict of not guilty for all of the defendants with respect

10:49:36 1 to Count II.

10:49:37 2 Counts IV and VI the indictment charge one more
10:49:46 3 of the defendants with knowingly and willfully making or
10:49:50 4 causing the making of a false statement of material fact in
10:49:54 5 a report to be filed with the Securities and Exchange
10:49:57 6 Commission.

10:49:57 7 Count IV and VI allege that Mr. Gibson, Mr.

10:50:02 8 Harra, Mr. North, and Ms. Rakowski committed the alleged
10:50:04 9 offense.

10:50:05 10 You must consider each count and each defendant
10:50:08 11 individually. As to each count and each defendant you are
10:50:12 12 considering, the Government must prove each of the following
10:50:15 13 elements beyond a reasonable doubt.

10:50:15 14 One, the SEC report at issue in the count you
10:50:20 15 are considering contained a false statement of fact;

10:50:22 16 Two, the statement was material;

10:50:24 17 Three, the defendant you are considering made or
10:50:27 18 caused the statement to be made;

10:50:28 19 And, four, the defendant you are considering
10:50:31 20 acted knowingly and willfully and with the intent deceive or
10:50:35 21 defraud.

10:50:35 22 You must be convinced that the Government has
10:50:38 23 proven all of these elements beyond a reasonable doubt in
10:50:42 24 order to find the defendant you are considering guilty of
10:50:45 25 the count at issue.

10:50:46 1 **If you find that the Government has filed to**
10:50:49 2 **prove any of these elements beyond a reasonable doubt with**
10:50:53 3 **respect to the defendant you are considering on any count,**
10:50:55 4 **you must return a verdict of not guilty with respect to the**
10:50:58 5 **defendant on that count.**

10:51:00 6 **The first element that the Government must prove**
10:51:05 7 **beyond a reasonable doubt in Count IV and VI is that the SEC**
10:51:10 8 **report in the count you are considering contained a false**
10:51:17 9 **statement of fact.**

10:51:18 10 **A statement is false if it's untrue when made**
10:51:22 11 **and if the person making the statement or causing it to be**
10:51:25 12 **made knew it was untrue at the time it was made.**

10:51:29 13 **I will now instruct you on the alleged false**
10:51:30 14 **statements of fact that you must consider for each count.**

10:51:33 15 **The only statements that you may consider with**
10:51:39 16 **respect to Count I are the following statements on the SEC**
10:51:42 17 **Form 10-K for 2009, submitted by Wilmington Trust**
10:51:46 18 **Corporation, Government Exhibit 1.**

10:51:47 19 **The Government contends that the following**
10:51:50 20 **statements on page 55 of the SEC Form 10-K for 2009 were**
10:51:54 21 **false:**

10:51:55 22 **One, the table listing the amounts of particular**
10:51:57 23 **categories of loans past due 90 days or more;**

10:52:00 24 **Two, the ratio of loans past due 90 days to**
10:52:05 25 **total loans outstanding and;.**

10:52:07 1 **Three, the discussion of accruing loans past due**
10:52:10 2 **90 days or more.**

10:52:11 3 **The three statements above on the Wilmington**
10:52:15 4 **Trust Corporation SEC Form 10-K for 2009, are the only**
10:52:19 5 **statements that you may consider with respect to Count IV.**

10:52:25 6 **The only statements that you may consider with**
10:52:28 7 **respect to Count VI are the following statements on the**
10:52:31 8 **second Form 10-Q for the first quarter of 2010, submitted by**
10:52:37 9 **Wilmington Trust Corporation, Government Exhibit 5.**

10:52:39 10 **The Government contends that the following**
10:52:42 11 **statements on page 88 of the SEC Form 10-Q for the first**
10:52:45 12 **quarter of 2010 were false:**

10:52:47 13 **One, the table listing the amounts of particular**
10:52:49 14 **categories of loans past due 90 days or more;**

10:52:52 15 **Two, the past due loan ratio; and**

10:52:55 16 **Three, the discussion of accruing loans past due**
10:52:57 17 **90 days or more.**

10:52:58 18 **These three statements are the only statements**
10:53:01 19 **that you may consider with respect to Count VI.**

10:53:04 20 Counts IV and VI of the indictment each allege a
10:53:11 21 number of false statements. The Government is not required
10:53:14 22 to prove that all of the statements that are alleged as
10:53:17 23 false in each count are, in fact, false.

10:53:20 24 However, the Government must prove beyond a
10:53:22 25 reasonable doubt that at least one of the specific

10:53:24 1 statements in each count counsel was false.

10:53:26 2 With respect to each count, all twelve of you
10:53:29 3 must agree beyond a reasonable doubt that the statement was
10:53:32 4 false. It is not enough to convict if some of you find that
10:53:36 5 the Government has proven one false statement charged in
10:53:38 6 Count I, while others of you find that the Government has
10:53:42 7 proven another false statement charged in that count.

10:53:45 8 If you do not all agree unanimously that the
10:53:48 9 Government has proven the same specific false statement
10:53:51 10 beyond a reasonable doubt with respect to count you are
10:53:55 11 considering, you must return a verdict of not guilty on that
10:53:58 12 count.

10:53:58 13 For the conduct charged in Counts IV and VI,
10:54:06 14 the Government must prove beyond a reasonable doubt that the
10:54:09 15 defendant's statements or representation was material.

10:54:10 16 A statement is material if there is a
10:54:12 17 substantial likelihood that a reasonable investor would have
10:54:15 18 viewed the information as having significantly altered the
10:54:18 19 total mix of information available.

10:54:20 20 This means that if you find that a particular
10:54:23 21 statement of fact was false, you must determine whether
10:54:26 22 there was a substantial likelihood that the statement was
10:54:28 23 one that a reasonable investor would have viewed as having
10:54:35 24 significantly altered the total application of information
10:54:36 25 available in making his or her decision to invest in

10:54:44 1 Wilmington Trust Corporation securities.

10:54:47 2 The third element of Count IV and VI that the
10:54:52 3 Government must prove beyond a reasonable doubt is that the
10:54:54 4 defendant you are considering made or caused the alleged
10:54:59 5 false statement to be made.

10:54:59 6 A defendant cannot be held responsible for any
10:55:01 7 false statement in the SEC report that he or she did not
10:55:05 8 make or cause to be made.

10:55:06 9 If the Government proves beyond a reasonable
10:55:08 10 doubt that the SEC report in the count you are considering
10:55:12 11 contained a materially false statement, but the Government
10:55:15 12 fails to prove beyond a reasonable doubt that the defendant
10:55:17 13 you are considering made that statement, or caused that
10:55:20 14 statement to be made in the SEC report, you must find that
10:55:23 15 defendant not guilty on that count.

10:55:24 16 I instruct you as a matter of law that the
10:55:28 17 following documents filed by the Wilmington Trust
10:55:31 18 Corporation with the Securities and Exchange Commission
10:55:33 19 constitute an application, report, or document required to
10:55:36 20 be filed with the Securities and Exchange Commission.

10:55:38 21 The offense of making a false statement in
10:55:42 22 documents required to be filed with the Securities and
10:55:46 23 Exchange Commission charged in the indictment requires that
10:55:48 24 the Government prove that a defendant acted knowingly and
10:55:50 25 willfully in making a false or fraudulent statement.

10:55:54 1 I have previously instructed you on the
10:56:04 2 definitions of knowingly and willfully.

10:56:04 3 I may have to get back to you what I mean by
10:56:18 4 that.

10:56:32 5 To convict on Counts IV and VI, the Government
10:56:35 6 must prove beyond a reasonable doubt that a defendant acted
10:56:40 7 with the intent to deceive or defraud.

10:56:41 8 I previously instructed you on the definition of
10:56:46 9 intent to defraud.

10:56:47 10 To act with the intent to defraud means to act
10:56:50 11 with intent to mislead or to cause a person to believe that
10:56:54 12 which is false.

10:56:55 13 In proving that a defendant acted with the
10:56:58 14 intent to deceive or defraud, the Government is not required
10:57:02 15 to prove that a defendant intended to cause harm to the
10:57:05 16 victim of the fraud.

10:57:06 17 Count V of the indictment alleges that Mr.
10:57:12 18 Gibson, Mr. Harra, Mr. North, and Ms. Rakowski, knowingly
10:57:16 19 and willfully made statements to the Securities and Exchange
10:57:16 20 Commission.

10:57:22 21 Counts XI and XVI of the indictment allege that
10:57:25 22 Mr. Gibson, Mr. Harra, Mr. North, and Ms. Rakowski knowingly
10:57:29 23 and willfully made false statement to the Federal Reserve or
10:57:33 24 the Securities and Exchange Commission.

10:57:34 25 As to each defendant and count you are

10:57:38 1 considering, in order to prove the defendant guilty of the
10:57:40 2 charge charged, the Government must establish beyond a
10:57:40 3 reasonable doubt:

10:57:43 4 First, that the report at issue contained a
10:57:45 5 false, fictitious, or fraudulent statement of fact;

10:57:48 6 Second, that this statement was material;

10:57:50 7 Third, that the defendants made the statement;

10:57:52 8 Fourth, that the defendant you are

10:57:54 9 considering acted knowingly and willfully; and

10:57:57 10 Five, that the statement was made in a matter
10:58:00 11 within the jurisdiction of the Government of the United
10:58:02 12 States.

10:58:02 13 As with all of the charges in the indictment,
10:58:04 14 unless the Government proves each element beyond a
10:58:07 15 reasonable doubt, you must find that the defendant you are
10:58:11 16 considering not guilty on the count you are considering.

10:58:14 17 With respect to Counts V and XI through XVI, the
10:58:22 18 first element that the Government must prove beyond a
10:58:27 19 reasonable doubt is that the statement or representation
10:58:28 20 until the count you are considering was false, fictitious,
10:58:28 21 or fraudulent.

10:58:31 22 A statement or representation is false or
10:58:33 23 fictitious if it was untrue when made, and known at the time
10:58:37 24 to be untrue by the person making it or causing it to be
10:58:41 25 made.

10:58:41 1 A statement is fraudulent if it was known to be
10:58:43 2 untrue when made and was made with the intent to deceive the
10:58:48 3 Government agency to which it was submitted.

10:58:49 4 I will now instruct you on the only statements
10:58:55 5 you may consider with respect to Counts V and XI through
10:58:58 6 XVI.

10:58:58 7 The Government contends that the following
10:59:03 8 statements on page 55 of the SEC Form 10-K for 2009 were
10:59:07 9 false:

10:59:08 10 One, that the table listing the amount of
10:59:10 11 particular categories of loan past due 90 days or more;

10:59:13 12 Two, the ratio of loans past due 90 days to
10:59:16 13 total loans outstanding; and

10:59:18 14 Three, the discussion of accruing loans past due
10:59:20 15 90 days or more.

10:59:21 16 The three statements identified above on the
10:59:24 17 Wilmington Trust Corporation SEC Form 10-K for 2009,
10:59:27 18 Government Exhibit 1, are the only statements that you may
10:59:30 19 considered with respect to Count V.

10:59:31 20 The only statements you may consider with
10:59:36 21 respect to Count XI are the following statements on the
10:59:40 22 Third Quarter 2009 Call Report, Government Exhibit 76.

10:59:42 23 The Government contends that the 90 day past due
10:59:46 24 amounts in line items, one, three, four, and six on page 43
10:59:50 25 of the Call Report are false.

10:59:52 1 It only statements you may consider with respect
10:59:57 2 to Count XII are the following statements on the Four
11:00:02 3 Quarter 2009 Call Report, Government Exhibit 77.

11:00:05 4 The Government contends that 90 day past due
11:00:07 5 loan amounts in line items one, four, and six on page 43 are
11:00:12 6 false.

11:00:12 7 The only statements you may consider with
11:00:17 8 respect to Count XIII are the following statements on First
11:00:22 9 Quarter 2010 Call Report, Government Exhibit 78.

11:00:23 10 The Government contends that the 90 day past due
11:00:23 11 loan amounts in line items one, four, and six, on page 43
11:00:32 12 are false.

11:00:32 13 The only statements you may consider with
11:00:38 14 respect to Count XIV are the following statements on the SEC
11:00:41 15 Form 10-Q for the Third Quarter of 2009, submitted by
11:00:44 16 Wilmington Trust Corporation, Government Exhibit 4.

11:00:46 17 The Government contends that the following
11:00:48 18 statement on page 145 of the SEC Form 10-Q for the Third
11:00:52 19 Quarter of 2009, were false:

11:00:53 20 One, the table listing the amounts of particular
11:00:55 21 categories of loans past due 90 days or more;

11:00:58 22 Two, the past due loan ratio; and

11:01:01 23 Three, the discussion of loans past due 90 days
11:01:03 24 or more.

11:01:04 25 The only statements that you may considered with

1 respect to Count XV are the following statements on the SEC
2 Form 10-Q for the First Quarter of 2010, submitted by
3 Wilmington Trust Corporation, Government Exhibit 5.

4 The Government contends that the following
5 statements on page 88 of the SEC Form 10-Q for the First
6 Quarter of 2010, were false:

7 One, the table listing the amounts of particular
8 categories of loans past due 90 days or more;

9 Two, the past due loan ratio; and

10 Three, the discussion of accruing loans past due
11 90 days or more.

12 The only statements you may consider with
13 respect to Count XVI are the following statements in the
14 Monthly Regulatory Report for October 2009, Government
15 Exhibit No. 243.

16 The Government contends that the 90 days or more
17 past due loan information is false.

18 Counts V XI through XVI of the indictment each
19 allege a number of false statements.

20 The Government is not required to prove that all
21 of the statements that are alleged in a particular count as
22 false are, in fact, false.

23 However, the Government must prove beyond a
24 reasonable doubt that at least one of the specific
25 statements in each count was false.

11:02:19 1 With respect to each count, all twelve of you
11:02:24 2 must agree beyond a reasonable doubt that the same statement
11:02:25 3 was false. It is not enough to convict if you find that the
11:02:29 4 Government has proven one false statement charged in a
11:02:31 5 count, while others of you find that the Government has
11:02:34 6 proven another false statement charged in that count.

11:02:37 7 If you do not all agree unanimously that the
11:02:41 8 Government has proven the same specific false statement
11:02:43 9 beyond a reasonable doubt with respect to the count you are
11:02:48 10 considering, you must return a verdict of not guilty on that
11:02:51 11 count.

11:02:51 12 For the conduct charged in Counts V and XI
11:02:59 13 through XVI, a fact is material if it had a natural tendency
11:03:04 14 to influence or was capable of influencing the action of the
11:03:07 15 decision-making body to which it is directed.

11:03:10 16 This means that if you find that a particular
11:03:12 17 statement of fact was false, you must determine whether that
11:03:15 18 statement was one that a reasonable person might have
11:03:18 19 considered important in making his or her decision.

11:03:21 20 The third element of the Counts V and XI through
11:03:28 21 XVI that the Government must prove beyond a reasonable doubt
11:03:31 22 is that a defendant you are considering made the materially
11:03:34 23 false statement.

11:03:34 24 A defendant cannot be held responsible for any
11:03:37 25 false statement that he or she did not make or cause to be

11:03:41 1 made.

11:03:41 2 If the Government proves beyond a reasonable
11:03:43 3 doubt that the report in the count you are considering
11:03:46 4 contained a materially false statement, but the Government
11:03:50 5 fails to prove beyond a reasonable doubt that the defendant
11:03:51 6 you are considering made that statement or caused it to be
11:03:55 7 made, you must find that defendant not guilty.

11:03:57 8 Counts V and XI to XVI require that the
11:04:03 9 Government prove that the defendants acted knowingly and
11:04:07 10 willfully.

11:04:07 11 I have previously instructed you on the
11:04:10 12 definitions of knowingly and willfully.

11:04:13 13 I hereby instruct you that the Securities and
11:04:18 14 Exchange Commission and the Federal Reserve are part of the
11:04:20 15 executive branch of the United States.

11:04:22 16 You may, therefore, finally fat alleged false
11:04:26 17 statements were made within the jurisdiction of those
11:04:27 18 agencies. A statement is made within the jurisdiction of an
11:04:30 19 agency if it covers any matter confided to the authority of
11:04:34 20 that agency.

11:04:35 21 Counts VII through X of the indictment charge
11:04:40 22 that Mr. Gibson, Mr. Harra, Mr. North, and Ms. Rakowski made
11:04:44 23 false entries in Call Reports and a Monthly Regulatory
11:04:48 24 Report.

11:04:48 25 Count VII through X each correspond to different

11:04:52 1 report containing an alleged false entry.

11:04:56 2 In order to prove the defendant you are
11:04:58 3 considering guilty of making a false entry into a bank
11:05:02 4 record, the Government must prove each of the following
11:05:04 5 statements beyond a reasonable doubt with respect to the
11:05:06 6 count you are considering:

11:05:07 7 First, that the defendant made an entry or
11:05:09 8 caused it to be made in the report of the bank as charged in
11:05:13 9 the indictment;

11:05:13 10 Second, that the entry was false as to a
11:05:17 11 material matter at the time that it was made; and

11:05:21 12 Three, that the defendant acted knowingly with
11:05:24 13 the intent to deceive the Federal Reserve.

11:05:25 14 Unless the Government proves each element beyond
11:05:29 15 a reasonable doubt, you must find the defendant you are
11:05:32 16 considering not guilty on that count you are considering.

11:05:35 17 An entry is false if untrue when made. An entry
11:05:42 18 may be false if it records a transaction which did not
11:05:45 19 occur, or fails to record a transaction which did not occur,
11:05:48 20 and should have been accurately recorded, or inaccurately
11:05:53 21 reports or records a transaction.

11:05:54 22 Counts VII through X require that the Government
11:06:00 23 prove that the defendants knew the entry was made was false
11:06:05 24 at the time of the entry.

11:06:06 25 This means that the Government must prove beyond

11:06:09 1 a reasonable doubt that the defendant was conscious and
11:06:11 2 aware of the nature of his or her actions and of the
11:06:15 3 surrounding facts and circumstances, as specified in the
11:06:18 4 definition of the offense charged, and knew that the
11:06:20 5 statement was false.

11:06:21 6 In deciding whether a defendant knew that a
11:06:24 7 particular entry was falsely made, you may consider evidence
11:06:27 8 that about what the defendant said, what the defendant did
11:06:30 9 and failed to do, how the defendant acted, and all the other
11:06:34 10 facts and circumstances shown by the evidence that may prove
11:06:38 11 what was in the defendant's mind at that time.

11:06:43 12 For purposes of Counts VII to X, a fact is
11:06:46 13 material if it had a natural tendency to influence, or was
11:06:51 14 capable of influencing the actions of the Federal Reserve to
11:06:53 15 which it is directed.

11:06:54 16 This means that if you find the particular
11:06:56 17 statement of fact was false, you must determine whether the
11:07:01 18 statement was one that a reasonable person might have
11:07:03 19 considered important in making his or her decision.

11:07:06 20 The first elements of Counts VII to X that the
11:07:13 21 Government must prove beyond a reasonable doubt is that the
11:07:14 22 defendant you are considering made or caused to be made the
11:07:18 23 entry in the report of the bank, as charged.

11:07:20 24 This does not mean that the Government must
11:07:22 25 prove that the defendant physically wrote the entries. It

1 is sufficient to satisfy this element if the Government
2 establishes beyond a reasonable doubt that the defendant you
3 are considering caused the entry to be made.

4 If the Government fails to satisfy its burden of
5 proof on this element, you must enter a verdict of not
6 guilty for the defendant you are considering on the count
7 you are considering.

8 The only statements you may consider with
9 respect to Count VII are the following statements on the
10 Third Quarter 2009 Call Report, Government Exhibit 76.

11 The Government contends that the 90 day past due
12 loan amount in line items one, three, four and six on page
13 43 of the Call Report are false.

14 The only statements you may consider with
15 respect to Count VII are the following statements of the
16 Fourth Quarter 2009 Call Report, Government Exhibit 77.

17 The Government contends that the 90 day past due
18 loan amounts in line items, one, three, four and 6 on page
19 43 are false.

20 The only statements you may consider with
21 respect to Count VIII are the following statements in the
22 First Quarter 2010 Call Report, Government Exhibit 77.

23 The Government contends that the 90 day past due
24 loan amounts in line items one, four and six on page 43 are
25 false.

11:08:39 1 The only statements you may consider with
11:08:39 2 respect to Count VIV are the following statements on the
11:08:39 3 First Quarter Call Report, Government Exhibit No. 78.

11:08:39 4 The Government contends that the 90 day past due
11:08:39 5 loan amounts in line items one, four, and six are false.

11:08:39 6 The only statements you may consider with
11:08:44 7 respect to Count X are the following statements in the
11:08:48 8 Monthly Regulatory Report for October 2009, Government
11:08:50 9 Exhibit No. 243.

11:08:51 10 The Government contends that the 90 or more days
11:08:54 11 past due loan information is false.

11:08:56 12 To act with intent to deceive means to act with
11:09:02 13 intent to mislead or to cause a person to believe that which
11:09:05 14 is false.

11:09:05 15 Counts VII through X allege a number of false
11:09:12 16 entries.

11:09:12 17 The Government is not required to prove that all
11:09:15 18 of the entries that are alleged in a particular count as
11:09:18 19 false are, in fact, false.

11:09:20 20 However, the Government must prove beyond a
11:09:22 21 reasonable doubt that at least one of the specific entry in
11:09:24 22 each count was false.

11:09:25 23 With respect to each count, all twelve of you
11:09:29 24 must agree beyond a reasonable doubt that the same entry was
11:09:31 25 false. It is not enough to convict if some of you find that

11:09:35 1 the Government has proven one false entry charged in a count
11:09:38 2 while others of you find that the Government has proven
11:09:41 3 another false entry charged in that count.

11:09:43 4 If you do not all agree unanimously that the
11:09:46 5 Government has proven the same specific false entry made
11:09:49 6 beyond a reasonable doubt with respect to that count you are
11:09:56 7 considering, you must return a verdict of not guilty on that
11:10:00 8 count.

11:10:01 9 A person may be guilty of an offense because he
11:10:07 10 or she personally committed the offense himself or herself
11:10:09 11 or because he or she aided and abetted another person in
11:10:13 12 committing the offense.

11:10:14 13 A person who has aided and abetted another
11:10:17 14 person in committing an offense is often called an
11:10:19 15 accomplice. The person whom the accomplice aids and abets
11:10:24 16 is known as the principal.

11:10:25 17 In this case, the Government alleges that
11:10:28 18 William North aided and abetted Wilmington Trust
11:10:30 19 Corporation, Robert Harra, and David Gibson in committing
11:10:36 20 Counts IV to XVI as charged in the indictment, and Kevyn
11:10:38 21 Rakowski aided and abetted Wilmington Trust Corporation,
11:10:42 22 Robert Harra and David Gibson in committing Counts VI to XI
11:10:44 23 and XIII to XVI.

11:10:45 24 For these specified offenses, I will refer to
11:10:48 25 Wilmington Trust Corporation, Robert Harra, and David Gibson

11:10:52 1 as to Counts II, IV and IV, and Ms. Rakowski, as principals.

11:10:56 2 In order to find William North or Kevyn Rakowski

11:10:59 3 guilty of these identified offenses because he or she aided

11:11:02 4 and an abetted one or more of the principals in committing

11:11:05 5 these offenses, you must find that the Government proved

11:11:08 6 beyond a reasonable doubt each of the following four

11:11:08 7 requirements:

11:11:11 8 First, that one or more of the principals

11:11:13 9 committed the offenses charged by committing the each of the

11:11:16 10 elements of the offenses charged, as I have explained these

11:11:19 11 elements to you in these instructions. The principals need

11:11:22 12 not have been charged with or found guilty of the offenses.

11:11:25 13 However, as long as you find that the Government proved

11:11:27 14 beyond a reasonable doubt that he or she committed the

11:11:30 15 offense;

11:11:30 16 Second, that the defendant knew that the

11:11:33 17 offenses charged was going to be committed or was being

11:11:36 18 committed by the principal;

11:11:37 19 Third, that the defendant knowingly did some act

11:11:40 20 for the purpose of aiding, assisting, facilitating, or

11:11:45 21 encouraging the principal in committing the specific offense

11:11:47 22 charged and with the intent that the principal commit the

11:11:51 23 specific offenses; and

11:11:56 24 Fourth, that the defendant performed the act in

11:11:59 25 furtherance of the offense charged.

11:12:01 1 The law, therefore, requires that the accomplice
11:12:03 2 must act with the same intent as required of a principal.

11:12:07 3 In deciding whether the defendant had the
11:12:10 4 required knowledge and intent to satisfy the third
11:12:16 5 requirement for aiding and abetting, you may consider both
11:12:16 6 direct and circumstantial evidence, including the
11:12:18 7 defendant's words and actions and the other facts and
11:12:18 8 circumstances.

11:12:22 9 However, evidence that the defendant merely
11:12:23 10 associated with persons involved in a criminal venture, or
11:12:26 11 was merely present, or was merely a knowing spectator during
11:12:30 12 the commission of the offense, is not enough for you to find
11:12:33 13 the defendant guilty as an aider and abettor.

11:12:35 14 If the evidence shows that the defendant knew
11:12:37 15 that the offense was being committed or was about to be
11:12:40 16 committed, but does not also prove beyond a reasonable doubt
11:12:42 17 that it was the defendant's intent and purpose to aid,
11:12:45 18 assist, encourage, facilitate, or otherwise associate
11:12:51 19 himself or herself with the offense, you may not find the
11:12:54 20 defendant guilty of the offense has an aider and abettor.

11:12:59 21 The Government must prove beyond a reasonable
11:13:02 22 doubt that the defendant in some way participated in the
11:13:02 23 offense committed by the principal as something the
11:13:10 24 defendant wished to bring about and to make succeed.

11:13:12 25 To show that the defendant performed an act in

11:13:15 1 furtherance of the offense charged to satisfy the fourth
11:13:18 2 requirement, the Government needs to show some affirmative
11:13:21 3 participation by the defendant which at least encouraged the
11:13:24 4 principal to commit.

11:13:25 5 That is, you must find that the defendant's act
11:13:28 6 did, in some way, aid, assist, facilitate, or encourage the
11:13:32 7 principal to commit the offense.

11:13:34 8 The defendant's act need not further aid,
11:13:38 9 assist, facilitate, or encourage every part or phase or
11:13:42 10 element of the offense charged. It is enough if the
11:13:45 11 defendant's act further aid, assist, facilitate, or
11:13:50 12 encourage only one part or phase or element of the offense.

11:13:52 13 Also, the defendant's acts need not themselves
11:13:58 14 be against the law.

11:14:01 15 Counts II through XVI of the indictment allege
11:14:13 16 that the defendants committed the following offense during
11:14:16 17 the course of the alleged conspiracy:

11:14:17 18 Securities fraud, Count II;

11:14:20 19 Making false statements in documents required to
11:14:23 20 be filed with the Securities and Exchange Commission, Counts
11:14:26 21 IV and VI;

11:14:26 22 Making false statements to the Securities
11:14:29 23 Exchange Commission and the Federal Reserve, Counts V and XI
11:14:33 24 to XVI;

11:14:33 25 Making false entries in banking reports, Count

11:14:37 1 VII to X.

11:14:37 2 The Government may prove a defendant guilty of
11:14:40 3 an offense charged in Counts II through XVI by proving that
11:14:44 4 the defendant personally committed that offense.

11:14:45 5 I will instruct you on the elements of each
11:14:45 6 offense momentarily.

11:14:53 7 The Government may also prove a defendant guilty
11:14:57 8 of an offense charged in Counts II through XVI offenses
11:15:00 9 based on the legal rule that each member of a conspiracy is
11:15:03 10 responsible for crimes and other acts committed by the other
11:15:07 11 members, as long as those crimes and acts were committed to
11:15:09 12 help further or achieve the objective of the conspiracy and
11:15:14 13 were reasonably foreseeable to the defendant as a necessary
11:15:16 14 or natural consequence of the agreement.

11:15:18 15 In other words, under certain circumstances, the
11:15:21 16 act of one conspirator may be treated as the act of all.
11:15:26 17 This means that all the conspirators may be convicted of a
11:15:30 18 crime committed by any one or more of them, even though they
11:15:33 19 did not all personally participate in the crime themselves.

11:15:36 20 In order for you to find a defendant guilty of
11:15:40 21 the offenses charged in Counts II through XVI based on this
11:15:43 22 legal rule, you must find that the Government proved beyond
11:15:47 23 a reasonable doubt each of the following four requirements:

11:15:49 24 First, that the defendant was a member of the
11:15:54 25 conspiracy charged in the indictment;

11:15:56 1 Second, that while the defendant was still a
11:15:59 2 member of the conspiracy, one or more of the other members
11:16:03 3 of the conspiracy committed an offense charged in Counts II
11:16:05 4 through with XVI, by committing each of the elements of that
11:16:09 5 offense, as I had explained those elements to you in these
11:16:13 6 instructions. However, the other members of the
11:16:15 7 conspiracy need not have been found guilty of, or even
11:16:18 8 charged with the offense, as long as you find the Government
11:16:21 9 proved beyond a reasonable doubt that the other members
11:16:24 10 committed the offense;
11:16:24 11 Third, that the other members of the conspiracy
11:16:27 12 committed the offense within the scope of the unlawful
11:16:29 13 agreement and to help further or achieve the objective of
11:16:33 14 the conspiracy; and
11:16:34 15 Fourth, that the offense was reasonably
11:16:39 16 foreseeable to or reasonably anticipated by the defendant as
11:16:40 17 a necessary or natural consequence of the unlawful
11:16:43 18 agreement.
11:16:43 19 The Government does not have to prove that a
11:16:45 20 defendant specifically agreed or knew that the offense would
11:16:49 21 be committed.
11:16:49 22 However, the Government must prove that the
11:16:51 23 offense was reasonably foreseeable to the defendant, as a
11:16:54 24 member of the conspiracy, and within the scope of the
11:16:57 25 agreement as the defendant understood it.

11:16:58 1 As I have instructed you, in order to prove that
11:17:01 2 the defendant was a member of the conspiracy charged in the
11:17:03 3 indictment, the Government must prove that the defendant
11:17:05 4 knew of an objective of the conspiracy to defraud the United
11:17:09 5 States or to commit an offense against the United States;
11:17:11 6 namely, securities fraud, making false statements in
11:17:15 7 quarterly or annual reports filed with the Securities and
11:17:19 8 Exchange Commission, and making false statements to the
11:17:21 9 Securities and Exchange Commission and the Federal Reserve.

11:17:23 10 The Government must further prove that the
11:17:25 11 defendant intended to join together with at least one or
11:17:28 12 other alleged conspirator to achieve one of these
11:17:33 13 objectives.

11:17:33 14 However, for you to find a guilty defendant of
11:17:37 15 an offense charged in Counts II through XVI based on the
11:17:44 16 rule that each member of a conspiracy is responsible for
11:17:46 17 crimes committed by other members, the Government does not
11:17:50 18 have to prove that the defendant specifically agreed or knew
11:17:53 19 that any specific offense would be committed, as long as the
11:17:56 20 Government proves that the offense was reasonably
11:17:59 21 foreseeable to the defendant, as a member of the conspiracy
11:18:02 22 and within the scope of the agreement as the defendant
11:18:05 23 understood it.

11:18:06 24 Counts XVII through XIV of the Third Superseding
11:18:11 25 Indictment charge that Mr. Gibson knowingly certified

11:18:13 1 **falsely that certain periodic reports filed with the**
11:18:16 2 **Securities and Exchange Commission complied with Section**
11:18:21 3 **13(A) or 15(d) of the Securities Exchange Act, when Mr.**
11:18:24 4 **Gibson knew that information contained in the periodic**
11:18:27 5 **reports did not fairly present, in all material respects,**
11:18:31 6 **the financial condition of the bank.**

11:18:33 7 **The periodic reports allegedly containing the**
11:18:36 8 **false certification were Wilmington Trust's Form 10-Q for**
11:18:39 9 **the Third Quarter of 2009, Form 10-K for the 2009, and Form**
11:18:45 10 **10-Q for the First Quarter of 2010.**

11:18:45 11 **According to the Government, the reason why**
11:18:57 12 **these certificates were false is that the periodic reports**
11:18:59 13 **pertaining to each certification did not report certain**
11:19:04 14 **matured loans that were current for interest payments and in**
11:19:10 15 **the process of extension as past due, which allegedly**
11:19:11 16 **resulted in Wilmington Trust failing to fairly represent, in**
11:19:15 17 **all material respects, the financial condition of the Bank**
11:19:18 18 **in violation of 18 U.S.C. Section 1350.**

11:19:22 19 **Section 1350(a) of Title 18 of the United States**
11:19:30 20 **Code required that each periodic report containing financial**
11:19:34 21 **statements filed by an issuer with the Securities and**
11:19:37 22 **Exchange Commission purchase pursuant to Section 13(a) or**
11:19:40 23 **15(d) of the Securities Exchange Act be accompanied by a**
11:19:44 24 **written statement by the chief executive officer and chief**
11:19:49 25 **financial officer of the issuer.**

11:19:50 1 **Section 1350(b) of Title 18 of the United States**
11:19:54 2 **Code provides that the written statement certify that it**
11:19:57 3 **accompanying periodic report fully comply with the**
11:19:59 4 **requirements of Section 13(a) or 13(d) of the Securities**
11:20:03 5 **Exchange Act and that information contained in the periodic**
11:20:04 6 **report fairly presents, in all material respects, the**
11:20:07 7 **financial condition and results of operations of the issuer.**

11:20:10 8 **Section 1350(c)(1) of Title 18 of the United**

11:20:15 9 **States Code provides that whoever certifies the written**
11:20:16 10 **statement knowingly that the accompanying periodic report**
11:20:19 11 **does not comport in all the requirements set forth in this**
11:20:23 12 **section shall be guilty of a crime.**

11:20:25 13 **Mr. Gibson is charged with more than one**
11:20:31 14 **offense. Each offense is charged in a separate count of the**
11:20:36 15 **Third Superseding Indictment.**

11:20:36 16 **The number of offenses charged is not evidence**
11:20:38 17 **of guilt, and this should not influence your decision in any**
11:20:42 18 **way. You must separately consider the evidence that relates**
11:20:45 19 **to each offense, and you must return a separate verdict for**
11:20:48 20 **each offense.**

11:20:49 21 **For each offense charged, you must decide**
11:20:52 22 **whether the Government has proved beyond a reasonable doubt**
11:20:54 23 **that Mr. Gibson is guilty of that particular offense,**
11:20:57 24 **meaning that the Government has proved beyond a reasonable**
11:21:01 25 **doubt each element of that particular evidence.**

11:21:04 1 You verdict on one count should not control your
11:21:08 2 verdict on any other count.

11:21:10 3 Mr. Gibson is charged in Counts XVII through XIV
11:21:16 4 of the Third Superseding Indictment with knowingly making
11:21:20 5 materially false certifications in financial reports.

11:21:22 6 To meet its burden of proof on Counts XVII
11:21:26 7 through XIV, the Government must prove as to each count of
11:21:30 8 the following five essential elements beyond a reasonable
11:21:32 9 doubt.

11:21:32 10 If the Government fails to prove any essential
11:21:35 11 element beyond a reasonable doubt, you must return a verdict
11:21:37 12 of not guilty on that count you are considering.

11:21:41 13 The five essential elements are:

11:21:43 14 First, that Mr. Gibson was the chief executive
11:21:46 15 officer, chief financial officer, or the equivalent of
11:21:49 16 Wilmington Trust Corporation; and

11:21:51 17 Second, that Wilmington Trust Corporation was an
11:21:53 18 issuer of securities regulated by the Securities Exchange
11:21:57 19 Act; and

11:21:58 20 Third, that Mr. Gibson certified that the
11:22:01 21 information contained in the Wilmington Trust Corporation's
11:22:03 22 periodic report to which the count pertains, fully complied
11:22:07 23 with the requirements of Section 13(a) or 15(d) of the
11:22:13 24 Securities Exchange Act of 1934, and fairly presented, in
11:22:17 25 all material respects, the financial condition and results

11:22:20 1 of operations of Wilmington Trust Corporation; and
11:22:22 2 Fourth, that this certification was materially
11:22:25 3 false; and
11:22:26 4 Fifth, that Mr. Gibson knew at the time that the
11:22:30 5 certification was made that the certification was materially
11:22:33 6 false.
11:22:33 7 If the Government has failed to prove any of
11:22:37 8 these elements beyond a reasonable doubt, you must return a
11:22:40 9 verdict of not guilty on the count you are considering.
11:22:43 10 The first essential element of Counts XVII
11:22:50 11 through XIV is that the Government must prove beyond a
11:22:52 12 reasonable doubt that Mr. Gibson was the chief executive
11:22:55 13 officer, chief financial officer, or the equivalent, of
11:22:59 14 Wilmington Trust.
11:22:59 15 The second essential element of Counts XVII
11:23:05 16 through XIV that the Government must prove beyond a
11:23:08 17 reasonable doubt is that the Wilmington Trust Corporation
11:23:09 18 was an issuer of securities regulated by the Securities
11:23:12 19 Exchange Act.
11:23:12 20 I instruct you that the issuers of securities
11:23:15 21 includes every person, including a corporation, who issues
11:23:18 22 or proposes to issue any security.
11:23:20 23 The term security includes stock.
11:23:22 24 The third essential element of Counts XVII
11:23:29 25 through XIV that the Government must prove beyond a

1 reasonable doubt is that Mr. Gibson certified that the
2 information contained in the Wilmington Trust Corporation's
3 periodic report to which that count pertains, fully complied
4 with the requirements of Section 13(a) or 15(d) of the
5 Securities Exchange Act of 1934.

6 And, two, fairly presented, in all material
7 respects, the financial condition and results of operations
8 of Wilmington Trust Corporation.

9 The periodic reports at issue are as follows:

10 Count 17, Wilmington Trust Form 10-Q filed
11 11/09.

12 Count 18, Wilmington Trust Form 10-K filed
13 2/22/10.

14 Count 19, Wilmington Trust Form 10-Q filed
15 5/10/10.

16 I further instruct you that Section 1350 of
17 Title 18 of the United States Code requires that an issuer's
18 quarterly and annual reports, SEC Forms 10-Q and 10-K
19 respectively be accompanied by a written certification by
20 the issuer's chief financial officer, that to those reports
21 complied with Section 13(a) or 15(d) of the Securities
22 Exchange Act in all material respects.

23 The fourth essential element of Counts XVII
24 through XIV that the Government must prove beyond a
25 reasonable doubt is that the certification made by Mr.

11:25:02 1 Gibson was materially false. Whether a
11:25:04 2 certification was materially false, must be determined at
11:25:08 3 the time it was made.

11:25:08 4 The Government contends that the certifications
11:25:12 5 in Counts XVII through XIV were false because loans that
11:25:16 6 were matured, current for interest payments, and in the
11:25:19 7 process of extensions, were past due and were required to be
11:25:23 8 reported as past due pursuant to either Section 13(a) or
11:25:26 9 15(d) of the Securities Exchange Act.

11:25:29 10 Whether a certification was materially false
11:25:31 11 must be determined at the time it was made; the
11:25:34 12 certification may not be considered false merely because
11:25:38 13 subsequent events prove it to be erroneous.

11:25:42 14 With respect to the phrase "in all material
11:25:46 15 respects," please use the definition of materiality that was
11:25:48 16 given in connection with Count II, i.e., information is
11:25:52 17 material only if there is a substantial likelihood that a
11:25:55 18 reasonable investor would have viewed the information as
11:26:01 19 having significantly altered the total mix of information
11:26:02 20 available.

11:26:03 21 This means that if you find that a particular
11:26:09 22 statement of fact was false, you must determine whether
11:26:12 23 there was a substantial likelihood that the statement was
11:26:15 24 one that a reasonable investor would have viewed as having
11:26:18 25 significantly altered the total mix of information available

11:26:21 1 in making his or her decision.

11:26:23 2 In fifth essential element of Counts XVII

11:26:34 3 through XIV that the Government must prove beyond a
11:26:36 4 reasonable doubt is that at the time the certification was
11:26:39 5 made, Mr. Gibson knew that the certification was false.

11:26:41 6 It also means that the Government must prove

11:26:43 7 beyond a reasonable doubt that Mr. Gibson was conscious and
11:26:46 8 aware that the periodic report to which that count pertains,

11:26:49 9 did not comply with the requirements of Section 13(a) or

11:26:52 10 15(d) of the Securities Exchange Act of 1934, and the

11:26:56 11 information contained in the periodic report did not fairly

11:26:59 12 present, in all material respects, the financial condition

11:27:01 13 and results of operations of f Wilmington Trust.

11:27:05 14 The Government must prove that Mr. Gibson made

11:27:08 15 the certification voluntarily and intentionally, conscious

11:27:11 16 and aware that the certification was false, and not because

11:27:13 17 of mistake or accident or any other innocent reason.

11:27:16 18 An honest or good faith belief by Mr. Gibson

11:27:20 19 that the certification was accurate, meaning an honest or

11:27:23 20 good faith belief by Mr. Gibson that loans that were

11:27:28 21 matured, interest- current, and in the process of extension

11:27:30 22 were not past due, and were not required to be reported as

11:27:33 23 past due, is a complete defense to this charge.

11:27:37 24 It is a complete defense to this charge even if

11:27:41 25 Mr. Gibson's good faith belief were mistaken or incorrect.

11:27:44 1 The meaning of good faith is as I defined it
11:27:48 2 before.

11:27:48 3 In deciding whether Mr. Gibson acted knowingly,
11:27:52 4 you may consider evidence about what Mr. Gibson said, what
11:27:58 5 Mr. Gibson did and failed to do, how Mr. Gibson acted, and
11:28:02 6 all other facts and circumstances shown by the evidence that
11:28:04 7 may prove what was in Mr. Gibson's mind at that time.

11:28:41 8 Members of the jury, there are another four
11:28:44 9 pages. I will read them to you after you hear the closing
11:28:47 10 arguments. There is no reason to read ahead on what the
11:28:53 11 lawyers will be arguing.

11:28:54 12 So we're going to take a 15 minute break.

11:28:56 13 The plan is this.

11:28:57 14 We're going to go until about 1:00 o'clock.

11:29:00 15 On what the lawyers told me, I expect the
11:29:02 16 Government's argument, since they go first, is going to last
11:29:06 17 longer than before 1:00 o'clock.

11:29:09 18 So they'll go to then. We'll break an hour for
11:29:12 19 lunch. We'll come back and they'll continue.

11:29:15 20 That's the plan.

11:29:16 21 Can we take the jury out and have a 15-minute
11:29:20 22 break here?

11:29:38 23 (The jury was excused for a short recess.)

11:29:56 24 THE COURT: All right. So it occurs to me
11:30:06 25 that -- you can be seated -- that on page 69, the following

11:30:10 1 documents, they're the 10-Q and the 10-K. Right?

11:30:13 2 MR. NOWAK: Right.

11:30:14 3 MR. KRAVETZ: Yes, Your Honor.

11:30:15 4 THE COURT: I think once upon a time the

11:30:17 5 instruction about the 10-Q and 10-K followed this

11:30:19 6 instruction and we moved it up front because I thought that

11:30:23 7 is logically more where it went. So when they come back, I

11:30:26 8 will just tell them that that is what I meant there. All

11:30:30 9 right?

11:30:31 10 MR. WOOD: Yes.

11:30:32 11 THE COURT: Anything else?

11:30:33 12 MR. KRAVETZ: No, Your Honor.

11:30:34 13 MR. WOOD: No Your Honor.

11:30:34 14 THE COURT: All right. We'll take a 15-minute

11:30:36 15 break.

11:30:37 16 (Short recess taken.)

11:37:19 17 - - -

11:37:19 18 (Proceedings resumed after the short recess.)

11:45:49 19 THE COURT: All right. Is everyone ready?

11:45:51 20 MR. KRAVETZ: Yes, Your Honor.

11:45:51 21 THE COURT: All right. Let's get the jury.

11:46:11 22 Mr. Kravetz, so you choose the time like within

11:46:28 23 plus or minus five minutes of 1:00 o'clock. Okay?

11:46:31 24 MR. KRAVETZ: Yes, Your Honor.

11:46:33 25 (The jury entered the courtroom.)

11:46:57 1 THE COURT: All right, members of the jury.

11:47:27 2 Welcome back. Everyone, you may be seated.

11:47:29 3 Members of the jury, you may recall that there
11:47:31 4 was one instruction I stumbled over, which had to do with
11:47:35 5 Counts 4 to 6, and it appears at page 69, where I was
11:47:40 6 talking about some documents that constituted application,
11:47:44 7 the documents required to be filed with the Securities and
11:47:47 8 Exchange Commission. It was supposed to say, "And those two
11:47:50 9 documents are the 10-Q and the 10-K." So that's what that
11:47:54 10 was about.

11:47:55 11 All right. Mr. Kravetz?

11:47:57 12 MR. KRAVETZ: Thank you, Your Honor. May it
11:47:59 13 please the Court, counsel. Good morning, ladies and
11:48:02 14 gentlemen.

11:48:04 15 The evidence has shown beyond all reasonable
11:48:07 16 doubt that the defendants caused Wilmington Trust to lie
11:48:11 17 about its past due loans, that the defendants knew what they
11:48:15 18 were doing was wrong, and that the lie mattered.

11:48:20 19 The lie mattered because it delayed the Federal
11:48:23 20 Reserve from finding out the bank's true condition, and it
11:48:27 21 mattered because the public invested over \$280 million based
11:48:32 22 on that lie. And when it comes down to it, that's what this
11:48:37 23 case is about. It's not about complex banking theories.
11:48:40 24 It's something much more simpler than that, the defendants'
11:48:44 25 failure to tell the truth.

11:48:47 1 Now, we've been together for several weeks.

11:48:50 2 You've heard from a number of witnesses. You've had a
11:48:54 3 chance to review a number of pieces of evidence, and the
11:48:58 4 goal today is to go through that witness testimony, to go
11:49:02 5 through the evidence, and to see how it relates to the
11:49:05 6 defendants, both individually and collectively.

11:49:08 7 And so where I would like to begin is, because
11:49:11 8 this is important with respect to all of the counts in the
11:49:14 9 indictment, is what was happening at Wilmington Trust in the
11:49:18 10 third quarter of 2009, which was the beginning of the
11:49:22 11 charged conduct.

11:49:23 12 We've heard from multiple witnesses, probably
11:49:27 13 every single witness, that the third quarter of 2009 was the
11:49:32 14 midst of the Great Recession. We were also, the bank was
11:49:37 15 also in the aftermath, a very critical Federal Reserve
11:49:42 16 examination, and we'll talk about that and some of the very
11:49:45 17 relevant findings.

11:49:47 18 And, third, there was an entire group of
11:49:50 19 commercial loans that were made in 2004 to 2006 that were
11:49:55 20 coming due.

11:49:59 21 I will start first with certain relevant
11:50:01 22 statistics, and this is from the bank's Form 10-K for 2009.
11:50:08 23 You heard testimony about the growth of Wilmington Trust's
11:50:13 24 commercial loan portfolio, and that's reflected in its
11:50:16 25 public filings. And you can see in 2005, Wilmington Trust's

11:50:20 1 total loans amounted to \$7.4 billion. That number went up
11:50:24 2 to \$8.9 billion, or roughly 9 billion by 2009. And there
11:50:32 3 was significant growth relating to commercial loans. In the
11:50:37 4 three-year, or the two-year period between 2007 and 2009,
11:50:42 5 commercial loans grew from \$5.6 billion to \$6.7 billion. So
11:50:48 6 \$1.1 billion in growth in commercial loans during that time
11:50:53 7 period. The bank was also making a lot of interest income
11:50:59 8 off of the loans that it made during the boom period. And
11:51:02 9 you can see that reflected in the Form 10-K as well where
11:51:06 10 net interest income rises from \$500 million in 2005 to
11:51:11 11 \$720 million in 2007 before it starts declining.

11:51:17 12 What else do we know from the evidence? That at
11:51:21 13 or around the period of the third quarter of 2009, home
11:51:24 14 builders were struggling and home sales were declining, and
11:51:29 15 that's borne out by the bank's own internal statistics.

11:51:34 16 We saw when Margery Stuart testified that there
11:51:37 17 was a document that was circulated throughout the bank
11:51:41 18 showing certain statistics relating to the housing market,
11:51:46 19 and this is just an example, and this is from Government's
11:51:49 20 Exhibit 937-A. But as you can see in 2008, you have a
11:51:53 21 drastic decline in building permits. There's just a
11:51:57 22 stalling in the market in terms of building homes. And the
11:52:01 23 graph is particularly striking. Look at the high point in
11:52:04 24 2005, 25,000-plus total permits within the area. That goes
11:52:09 25 down to 8,200 in 2009. The economy was stalled. Home

11:52:17 1 prices also declined.

11:52:19 2 Now, you can review the exhibit, but the
11:52:22 3 particular enlargement here is showing in the first line the
11:52:25 4 decline in the median sales price in New Castle County by
11:52:29 5 approximately \$43,000 from 2008 to 2009. In Kent County,
11:52:35 6 there was a decline of about 25,000. And in Sussex and down
11:52:40 7 by the beach area, almost \$50,000. So this is the
11:52:43 8 information that is relevant at or around the third quarter
11:52:47 9 of 2009. Every relevant housing statistic is going in the
11:52:53 10 wrong direction. Units sold are down. Units listed are
11:52:57 11 down. The sales price is down. The days on the market is
11:53:00 12 going up because it's much more difficult to sell a home.
11:53:04 13 Active listings are going down, and the supply in months,
11:53:08 14 because we have more houses that can't be sold, that's going
11:53:11 15 up as well.

11:53:12 16 You also saw an exhibit that was originally sent
11:53:19 17 by Mr. Terranova to Mr. Bailey talking about specifically
11:53:24 18 the impact on the Delaware economy on residential home
11:53:28 19 builders, and that was at Exhibit Number 405. And if you
11:53:33 20 recall the e-mail from Mr. Bailey back to Mr. Terranova, he
11:53:38 21 indicated that the information they were getting back from
11:53:40 22 appraisals had the "near term potential for catastrophic
11:53:45 23 consequences."

11:53:46 24 Now, that particular document, particular
11:53:49 25 e-mail, was forwarded by Mr. Bailey to Mr. Harra in the

1 beginning part of April of 2009, where he writes, surprise,
2 surprise. The values are coming back lower. It's mark to
3 market where there is no market. And that e-mail is
4 important because it's an early warning sign to defendant
5 Harra, the president of the bank, and at the time the person
6 in charge of all regional banking activities that the bank
7 would have difficulties properly extending loans because the
8 appraised values are coming back significantly lower.

9 The second item I mentioned was the highly
10 critical 2009 Federal Reserve examination. This was a
11 seismic shift in the world of Wilmington Trust, and the
12 timing is interesting because it coincides with that last
13 e-mail that we saw from April of 2009. As Mr. Corkery and
14 Mr. Fomunyam testified, the examination began in April of
15 2009 and concluded in August, and it was based on loan
16 information from March of 2009.

17 The examination did not go well for Wilmington
18 Trust. The Federal Reserve rated the condition of
19 Wilmington Trust Corporation less than satisfactory, and
20 highlighted certain prominent supervisory concerns,
21 including management's failure to properly identify and
22 control asset quality problems in a timely manner, the
23 failure to identify problem loans, and the use of
24 inappropriate controls and reporting structures.

25 The Fed also rated Wilmington Trust Company,

1 which is the Delaware banking subsidiary, less than
2 satisfactory, and highlighted a significant deterioration in
3 the quality of the bank's loan and security portfolio, weak
4 credit administration, and noted that the current economic
5 environment, the Great Recession, that that brought to the
6 forefront inherently weak credit risk management processes
7 and noted that the bank had a considerably high risk
8 profile.

9 Specifically, the Federal Reserve found that the
10 bank's asset quality was less than satisfactory and provided
11 statistics of what had happened over the last
12 year-and-a-half period, noting that the rate in downgrades
13 within the portfolio over the past 15 months was "alarming,
14 and a key supervisory concern." And they noted that with
15 respect to certain statistics, there was a good indication
16 that the level of problem loans will increase. The bank and
17 the defendants were placed on notice that there was a
18 problem relating to certain loans within the portfolio.

19 The Federal Reserve also criticized credit risk
20 management practices at the bank, and in particular, there
21 were four deficiencies that were noted.

22 First, a credit culture that seeks to serve the
23 client first, rather than emphasizing loan quality.

24 And you heard some of that in the testimony of
25 Marty Infanti and Joseph Terranova, talking about how within

11:57:27 1 the Delaware market, the bank was starting to reach for
11:57:32 2 other low tier borrowers in order to grow the loan
11:57:36 3 portfolio.

11:57:36 4 Second, a credit policy that is not commensurate
11:57:39 5 with the complexity of lending activities.

11:57:44 6 Third, a weak underwriting and ineffective
11:57:49 7 credit administration process.

11:57:51 8 That is also supported by testimony of certain
11:57:56 9 witnesses that you heard from, like Marty Infantini, who
11:58:00 10 talked about when he and others in his division were going
11:58:03 11 through and risk rating loans, that they were finding a
11:58:07 12 number of issues with respect to what they were reviewing in
11:58:11 13 terms of missing documents, stale appraisals, and improper
11:58:16 14 loan approvals.

11:58:16 15 If you recall the one e-mail from Mr. Infantini
11:58:19 16 where he said, the horse is not only out of the barn, but
11:58:24 17 running down the road, that was a specific e-mail that is
11:58:28 18 relating to problems with the credit administration process.

11:58:36 19 And finally, an understaffed loan review
11:58:39 20 function that lacks independence.

11:58:40 21 Now, there was testimony that following the
11:58:42 22 examination, that the bank hired more people, and was able
11:58:45 23 to get a better review of loans that they were risk rating
11:58:51 24 on the portfolio, but even those staffing changes weren't
11:58:55 25 enough to keep Mr. Infantini, who ultimately left is the bank.

11:58:59 1 The examination also highlighted problems with
11:59:04 2 working capital lines of credit and the use of interest
11:59:08 3 reserves. And if you recall, Mr. Fomunyam testified about
11:59:15 4 this first specific finding, which was the tendency at the
11:59:22 5 bank to extend multiple working capital loans or lines of
11:59:25 6 credit and interest reserves. And if you remember
11:59:27 7 Mr. Fomunyam gave an analogy to you of the use of credit
11:59:30 8 cards, where if you have one credit card and have trouble
11:59:34 9 paying and then get a second credit card to pay down the
11:59:37 10 first and then it snowballs into a third and a fourth, that
11:59:40 11 was the analogy that Mr. Fomunyam provided with the same
11:59:44 12 type of lending that was happening in the commercial
11:59:47 13 context.

11:59:47 14 The Fed also cited that there was falling home
11:59:54 15 prices and an oversupply of housing units, which should not
11:59:58 16 have been a surprise given that the internal information was
12:00:01 17 consistent.

12:00:04 18 The Fed also found that there were mothballed
12:00:08 19 projects that were highly dependent on a rebound in the
12:00:10 20 market. And Mr. Fomunyam gave an example of the Harrington
12:00:15 21 lending relationship in Western Sussex County, where
12:00:20 22 properties were mothballed. That is, no one could buy the
12:00:24 23 homes in the particular areas for the prices that they were
12:00:26 24 being sold for, and the only thing that could bring those
12:00:29 25 specific developments back would be if there was a rebound

in the housing market that had not happened during that time period. And all of this is linked to the potential to mask delinquency levels in past due loans.

4 So the Federal Reserve in the summer of 2009 is
5 having -- making specific findings that these types of
6 lending practices, lending working capital lines of credit
7 to homebuilders, using loan proceeds from one loan to pay
8 off another, that they could mask delinquency levels and the
9 specific charged conduct in the indictment.

What the Federal Reserve found as part of its
examination should not have been a surprise to the
defendants. And if you recall, in January of 2009,
Mr. Gibson sent an e-mail to all three of the defendants as
well as other bank employees with the subject, KPMG. And it
states that, John just gave me the current status of their
review of the interest reserve issue. He first said that he
looked for guidance and found nothing definitive other than
some references to be very cautious when capitalizing
interest. Cut to the chase.

20 And then the second part that's enlarged states,
21 "He admitted he starts with the premise that capitalized
22 interest is not good, and any time a second extension is
23 made should be an immediate red flag."

24 So even prior to the Federal Reserve coming on
25 the scene in April of 2009, the bank's own auditor had

1 identified the use of second extensions as an immediate red
2 flag.

3 As a result, the bank was forced to change its
4 policies, and you saw an e-mail in or around April of 2009
5 that notes that the bank was making changes with respect to
6 certain lending practices. And what's the response from
7 defendant Harra, who is the president of the bank and head
8 of regional banking? He says, "So what I am referring to
9 here are the issues we debated with the Grand Inquisitors
10 during the Inquisition. I thought we debated our points
11 with Depman and were going to set them out here. What am I
12 missing here or did we decide to roll over and no one told
13 me?"

14 And then at the top, the response from Mr.
15 North, where he states that, open-ended, that is not
16 project-related lines to commercial real estate developers,
17 are not something that we're looking to push.

18 So it's an awareness that the defendants, two of
19 the leaders of the bank, are aware of specific problems with
20 the practice and that they had changed their policies
21 accordingly.

22 The Federal Reserve also made findings relating
23 to the ten percent rule. And you've heard a lot of
24 testimony about the ten percent rule, which was a rule that
25 only applied to borrowers who had \$5 million or more worth

1 of loans at the bank. It did not apply to everyone, only to
2 a unique category of borrowers.

3 And it was also used, as you heard through the
4 testimony, to support the riskiest types of loans within
5 the bank's portfolio, commercial real estate construction
6 loans.

7 And so what the Federal Reserve found was that
8 the use of the ten percent rule "created undue repayment
9 risk for the bank." And there's an indication that
10 management indicated that the issue was addressed during the
11 examination. We heard from Mr. Fomunyam, it was not. When
12 the Federal Reserve came back in 2010, the ten percent rule
13 still existed, and it only ended when the Federal Reserve
14 required the bank to eliminate it.

15 Now, just like with issues relating to working
16 capital lines of credit, the identification of ten percent
17 rule loans as a problem should not have been a surprise to
18 the defendants. In fact, other bank employees were talking
19 about abuses or potential abuses of the ten percent rule
20 many months earlier.

21 And so during trial, when Stephen Cummings
22 testified, he was shown an e-mail from September 2008, which
23 he sent to, among other people, Mr. North and Mr. Brewer,
24 where Mr. Cummings is specifically referencing an internal
25 report prepared by the bank that captures the list of all

12:05:21 1 the ten percent rule loans.

12:05:24 2 If you recall, Mr. Terranova testified that,
12:05:28 3 yes, he was making a number of ten percent rule loans. Yes,
12:05:31 4 what he did was illegal, but that certainly, there was the
12:05:35 5 ability for other people within the bank to know about the
12:05:38 6 ten percent rule loans that were made. And what this e-mail
12:05:43 7 demonstrates is, that's exactly right, because here, in
12:05:46 8 September of 2008, Mr. Cummings is writing about the ten
12:05:50 9 percent rule list, and he's noting specifically that there
12:05:55 10 were ten percent rule loans that were made very close to the
12:05:59 11 loan committee process.

12:06:00 12 If you remember, that's one of the reasons why
12:06:02 13 Mr. Terranova pled guilty, because he broke the law by using
12:06:06 14 the ten percent rule after he had represented different
12:06:11 15 things to the loan committee at the time that the loan was
12:06:14 16 approved.

12:06:15 17 So here, Mr. Cummings is looking into the issue
12:06:18 18 and sending an e-mail to Mr. North in September of 2008,
12:06:22 19 one year before the Federal Reserve examination report comes
12:06:26 20 out, and he notes that it is also uncertain whether the
12:06:30 21 rapid use of the approval methodology represent any
12:06:33 22 inappropriate activity, although a closer look at the
12:06:38 23 approvals done 24 hours after committee may warrant closer
12:06:41 24 inspection to ensure that they do not.

12:06:44 25 Now, as we make our way through all the various

12:06:50 1 arguments of counsel in closing arguments, you might hear a
12:06:53 2 lot of blame placed on what happened at the bank on Mr.
12:06:59 3 Terranova and Mr. Bailey, and certainly, Mr. Terranova
12:07:04 4 deserves some of that blame, and he pled guilty and he told
12:07:08 5 you all about it.

12:07:09 6 But keep in mind, ladies and gentlemen, when you
12:07:11 7 hear that argument, that bank personnel had all the
12:07:14 8 information about what Mr. Terranova was doing back in 2008
12:07:19 9 and 2009, and there were no complaints about Mr. Terranova
12:07:22 10 in 2005 and 2006, when he was the golden boy at Wilmington
12:07:28 11 Trust and had nearly \$500 million worth of loans.

12:07:31 12 And so you can see when the ten percent approval
12:07:34 13 list comes out, all of the various, and it's not just Bailey
12:07:38 14 and Terranova, but there are other lenders that are using
12:07:40 15 the ten percent rule as well. But important here is, this
12:07:44 16 is information that is open and available as to what they
12:07:47 17 are doing, the types of loans that they're making, and this
12:07:50 18 is September of 2008, and Mr. Terranova isn't fired until
12:07:55 19 May of '10, or asked to resign in May of '10.

12:08:05 20 I mentioned the horse is out of the barn e-mail
12:08:08 21 earlier. It comes from this e-mail that is displayed, which
12:08:14 22 is referencing a lending relationship known as Cabbage
12:08:18 23 Corner. And Mr. Infanti testified about the relationship
12:08:24 24 and went through the e-mail. But important here is Ms.
12:08:29 25 Thuresson, who is Mr. Infante's boss, is writing about

12:08:32 1 Cabbage Corner in May of 2009 and talking about some very
12:08:36 2 specific problems in the way that the loans were made with
12:08:39 3 respect to this lending relationship. And she notes,
12:08:44 4 between this issue and the myriad ten percent rule issues
12:08:47 5 being seen by my team, I'm beginning to have difficulty
12:08:51 6 quashing concerns about the integrity of the lending
12:08:54 7 process. Again, this is all information that's available
12:09:00 8 even before the Federal Reserve issues its findings relating
12:09:03 9 to the ten percent rule.

12:09:05 10 The Fed also made findings relating to
12:09:10 11 noncompliance with bank policies, practices, and procedures.
12:09:17 12 And if you recall, Mr. Fomunyam talked about this finding as
12:09:23 13 well during his testimony. And if you look at the numbers,
12:09:27 14 it's pretty amazing. The Federal Reserve notes that in the
12:09:32 15 first half of 2009, just the first six months of 2009, there
12:09:35 16 were more than double the policy and practice violations
12:09:39 17 than the entirety of 2008 combined, more than double just in
12:09:45 18 the first six months. And in that context, it makes sense
12:09:49 19 given what was happening within the economy and the fact
12:09:52 20 that a lot of loans were starting to come due within the
12:09:55 21 portfolio.

12:09:56 22 And specifically, with respect to policies, if
12:10:01 23 you recall, you heard from witnesses that bank policies are
12:10:04 24 the roadmap for lending. That's how Mr. Fomunyam described
12:10:08 25 them.

12:10:09 1 Mr. Cummings, Steve Cummings, who was
12:10:11 2 essentially the keeper of the bank policies at Wilmington
12:10:16 3 Trust, testified the policies were supposed to be as strict
12:10:19 4 as federal lending regulations, and he said that bank
12:10:24 5 policies were important, because that is the expectation of
12:10:27 6 the regulators. And so here, when the Fed comes in during
12:10:31 7 the 2009 examination, they are finding significant issues
12:10:35 8 relating to the bank's compliance with its own policies.

12:10:38 9 These issues are linked to past due loans and to
12:10:50 10 the question that you have before you, which is whether the
12:10:52 11 defendants caused the bank to lie about its amount of 90-day
12:10:55 12 past due loans. And so the Federal Reserve writes that
12:11:00 13 while the bank's delinquency ratios are below peer group
12:11:03 14 averages, it was observed during the examination that an
12:11:06 15 inordinate number of loans have interest reserves and/or
12:11:09 16 working capital lines of credit that may be masking the
12:11:13 17 severity of the problem loans in the portfolio.

12:11:18 18 Mr. Fomunyam testified that all of these issues
12:11:28 19 that were identified in the asset quality portion of the
12:11:30 20 report, that he specifically addressed them during loan
12:11:33 21 discussions with the lenders and Mr. North.

12:11:38 22 You heard Mr. Corkery testify that all of the
12:11:41 23 examination findings were shared in an exit meeting with
12:11:45 24 Mr. Gibson, Mr. Harra, and other members of bank leadership,
12:11:50 25 and then they were enshrined in an examination report that

12:11:54 1 came out on September 4th of 2009.

12:11:58 2 We will also see it later, but if you recall,
12:12:05 3 near one of the last days of trial, we introduced a letter
12:12:11 4 from the Federal Reserve that was found in Ms. Rakowski's
12:12:14 5 desk files that highlighted many of the same issues that the
12:12:17 6 Federal Reserve found in connection with the 2009
12:12:20 7 examination, and that will be in the slide a little bit
12:12:23 8 later in the presentation.

12:12:24 9 So what happens as a result of the Federal
12:12:30 10 Reserve's 2009 full scope examination? The Federal Reserve
12:12:35 11 mandates that the bank enters into a memorandum of
12:12:38 12 understanding, which is an informal enforcement action that
12:12:42 13 had a number of provisions.

12:12:47 14 Important for our purposes, one of those
12:12:49 15 provisions was the following, paragraph 15-C. Within
12:12:54 16 20 days of the end of each month, Wilmington Trust and the
12:12:58 17 bank will provide to the reserve bank and the OSBC:

12:13:02 18 Month-end past due and nonaccrual loan reports.

12:13:09 19 So as you keep the timing of the certain
12:13:12 20 sequence of events in mind, that is important, and this is
12:13:17 21 October 21st of 2009, and for the very first time, the bank
12:13:20 22 is going to have to provide past due information on a
12:13:23 23 monthly, not a quarterly basis, and more importantly, it has
12:13:28 24 to go to the Federal Reserve, and it has to be truthful and
12:13:32 25 accurate.

12:13:37 1 That brings us to the waiver practice. And the
12:13:40 2 way that you can think about the waiver practice based on
12:13:44 3 the context of the evidence that has come in throughout the
12:13:47 4 case is the waiver practice starts out as a little white
12:13:53 5 lie. The waiver practice was always wrongful, and you'll
12:13:56 6 see certain slides about it. And it was wrongful because it
12:13:59 7 didn't comport with the applicable regulations in terms of
12:14:05 8 reporting past due loans.

12:14:08 9 But early on, the numbers were much smaller, the
12:14:12 10 impact was much lower, and over time, the waiver practice
12:14:14 11 snowballs, and it turns from this little white lie into what
12:14:18 12 is later described by defendant North in an e-mail as the
12:14:23 13 matured loans beast. Now, when I say the waiver practice
12:14:30 14 was always a problem, don't take my word for it. That was
12:14:35 15 the defendants' understanding of it.

12:14:37 16 This is Government's 418, which you will see
12:14:40 17 quite a bit today, and you will see that three different
12:14:45 18 bank employees in January of 2010 referred to the waiver
12:14:50 19 practice as, first, a decades old issue. That was Mr.
12:14:55 20 North. Second, a decades old problem. That is Mr. Conway.
12:15:01 21 And, third, a longstanding problem. That is Ms. Thuresson.
12:15:06 22 Decades old, longstanding. And these are bank employees who
12:15:12 23 are talking about the waiver practice at a time when they
12:15:15 24 probably don't think that someone is going to be looking at
12:15:17 25 their e-mails seven or eight years later. That is how they

12:15:20 1 described the waiver practice.

12:15:22 2 We also heard testimony and saw an e-mail
12:15:28 3 relating to, what was the original basis for the waiver
12:15:31 4 practice? And it's Government's Exhibit 417, and it's an
12:15:35 5 e-mail from Wayne Irwin to, among other people, Bill North.
12:15:42 6 And Wayne Irwin describes it to Mr. North as the original
12:15:45 7 concept of waiving loans is no longer an issue. The
12:15:48 8 original process of waiving loans started due to the
12:15:50 9 nonpayment between Wilmington Trust and Wilmington Trust of
12:15:54 10 Pennsylvania and Wilmington Trust FSB participation banks,
12:16:03 11 participation loans.

12:16:04 12 And then Mr. Irwin notes, now we have the task
12:16:07 13 of taking away the crutch of waiving loans for the matured
12:16:11 14 loans.

12:16:12 15 Mr. Conway responds and indicates that this is
12:16:14 16 something that he's going to bring up at the Mid-Atlantic
12:16:17 17 market meeting the following week. And we will see some
12:16:21 18 agenda items from Mid-Atlantic market meetings later, but
12:16:24 19 this was a meeting that Mr. Conway testified was always
12:16:27 20 chaired by Mr. Harra, because he was the head of regional
12:16:31 21 banking at Wilmington Trust.

12:16:32 22 Now, I said before that you can infer that when
12:16:37 23 the waiver practice began, it was like the little white lie
12:16:40 24 at the bank. Evidence introduced by the defendants proves
12:16:44 25 that point. And so the defendants introduced a version of

12:16:51 1 the past due report from September of 1999, and it was for
12:16:58 2 the purpose of showing that the waiver practice had existed
12:17:01 3 for a long period, at least ten years before the charged
12:17:04 4 conduct.

12:17:05 5 But if you recall, we were able to sort that
12:17:09 6 information and demonstrate that in September 1999,
12:17:14 7 ten years before the conduct alleged in the indictment,
12:17:17 8 there was only one 90-day past due loan waived as current
12:17:21 9 for interest, extension in process, totaling \$1.08 million.
12:17:28 10 You will see that that number. The number of loans and the
12:17:32 11 amount gets much, much higher as time goes on.

12:17:38 12 Defendants also introduced a former past due
12:17:41 13 early warning report from June of 2006, so now we're about
12:17:47 14 seven years later. Let's see what happened with respect to
12:17:51 15 the 90-day past due loans that were waived. There were nine
12:17:53 16 of them. That's it. Nine loans that were past due for
12:17:57 17 90 days or more and waived as current for interest in the
12:18:02 18 process of extension, only \$2.7 million.

12:18:11 19 But in terms of the waiver practice being a
12:18:13 20 problem even though the numbers weren't as high as they
12:18:17 21 eventually rose to at the end of 2009 and into 2010,
12:18:24 22 defendant North realized that the waiver practice was a
12:18:27 23 problem. And you saw a number of e-mails that defendant
12:18:31 24 North would write at quarter end when the delinquency report
12:18:35 25 was being passed out to other people within the lending

12:18:39 1 function.

12:18:39 2 So the first example, an e-mail from Mr. North,
12:18:45 3 March of 2007, where he notes, the number of waived matured
12:18:48 4 loans has been too high over the last four quarters, going
12:18:51 5 back to March of 2006.

12:18:53 6 He notes further, in order to avoid that
12:18:56 7 becoming an issue with examiners, audit or executive
12:19:00 8 management, I like to think that we can help ourselves by
12:19:03 9 getting this under control.

12:19:07 10 Another example. November of 2008, a few months
12:19:11 11 later, or actually, a year and a few months later, Mr. North
12:19:16 12 attaches a version of the past due report and he notes that
12:19:20 13 while this is an off quarter end month, the concern is that
12:19:23 14 such a level of matured facilities could be viewed as a
12:19:27 15 serious administrative weakness. At many banks, you can't
12:19:33 16 advance under a matured facility. If we move in that
12:19:35 17 direction, we'd have major issues based on how we've been
12:19:39 18 handling these historically.

12:19:40 19 And if you recall, you heard from Barbara Marley
12:19:44 20 and Terry Brewer, that eventually that practice of advancing
12:19:47 21 on a matured facility ended, but it wasn't until almost a
12:19:52 22 year later. Mr. North was identifying this as a problem in
12:19:56 23 November of 2008.

12:19:59 24 The next example, from June of 2008, which is a
12:20:03 25 few months earlier. Mr. North noting with respect to the

1 1 hundred plus or minus in matured interest current loans that
2 2 need to be addressed. And he writes on the latter, if we've
3 3 completed our approval process on these. But the
4 4 documentation has not gotten processed. I'm okay with
5 5 waiving. All other "I'm working on it" situations are not
6 6 ones that we should be waiving.

7 7 And he also ties his knowledge of the impact of
8 8 the waiver practice in the next paragraph.

9 9 Mr. North writes that getting this done is,
10 10 "extremely important as we report out our second quarter
11 11 numbers." So when you are asked to consider the defendants'
12 12 knowledge that conduct was wrongful and unlawful, well,
13 13 here, there's a recognition from Mr. North where the
14 14 numbers are going. They are going to be reported out
15 15 publicly, and he is aware of the impact of not reporting
16 16 the waived loans.

17 17 What was the standard in 2009? Defendant
18 18 North's standard, and this came from the testimony of
19 19 Mr. Cummings in an e-mail that we'll see in a moment, was
20 20 only to waive bank errors or loans that were extended, but
21 21 not processed on the Shaw system in time. Defendant North
22 22 disregarded his own standard, as the evidence has shown.

23 23 This is the initial e-mail, Government's
24 24 Exhibit 445, that Steve Cummings sent to Bill North in
25 25 January of 2009, that starts, Bill, for you to edit or

12:21:44 1 forward. And the highlighted portion is what Mr. North
12:21:48 2 included in the e-mail. And Mr. North notes in his edits
12:21:53 3 that, I had thought that for the last few quarters, that we
12:21:57 4 were trying to only waive bank errors or loans that made it
12:22:01 5 through the approval process.

12:22:03 6 He also notes at the very end, and this is the
12:22:05 7 section added by Mr. North, that in reference to a true past
12:22:12 8 due number, "Without a lot of adjustments, that could raise
12:22:16 9 issues for us at some point in the future."

12:22:18 10 And so again, as you're asked to determine
12:22:22 11 defendant North's knowledge, his mental state, his
12:22:27 12 willfulness in committing the conduct, there's an awareness
12:22:30 13 here of, the goal is to report a true past due number. That
12:22:33 14 is, not to report or not to waive matured loans.

12:22:37 15 And ultimately, this is the e-mail that goes out
12:22:40 16 to members of the lending staff, the relationship managers,
12:22:45 17 who are -- who have responsibilities over the portfolio.

12:22:55 18 The evidence has shown that there's a reason why
12:23:01 19 this didn't happen, because in a bad economy, when no
12:23:08 20 developments are being built, it is really hard to extend a
12:23:11 21 commercial real estate loan. That is because, as you heard
12:23:16 22 at trial, extending a matured loans requires the same level
12:23:21 23 of underwriting, if not more, than making the loan in the
12:23:25 24 first place, because something has happened along the way.
12:23:29 25 The expectation is the project will be complete in three

1 years. That's the testimony that you heard. But something
2 has happened along the way that that did not occur.

3 And so Marty Infanti testified that loan
4 underwriting should be more robust when extending loans in a
5 bad economy.

6 Rich Conway testified that the bank applied the
7 same considerations at the time of extension that they did
8 at loan origination.

9 Terry Brewer explained that the maturity date is
10 the bank's chance to re-evaluate a matured loan and to
11 re-underwrite it, and that you want to understand why that
12 particular loan has not performed as contemplated at the
13 time of the original underwriting.

14 And Mr. Fomunyam explained to you why it's so
15 important to underwrite matured loans in a bad economy, and
16 he noted that in the 2010 examination, he specifically
17 brought up the fact that he was seeing a lot of short-term
18 extensions as a problem, because it has the ability to
19 otherwise mask delinquent loans within the portfolio.

20 So where are we by the summer of 2009? Waived
21 loans are becoming overwhelming. There's an e-mail from
22 Rich Conway to defendant North in June of 2009 where he
23 attaches a list that shows that there are 507 loans totaling
24 \$708 million that have either matured or are going to mature
25 by quarter end. And he notes that the reality today is the

12:25:20 1 number is overwhelming, and that's reflected in the next
12:25:26 2 chart.

12:25:28 3 If you recall, Mr. Hart testified about his
12:25:32 4 analysis of the waived loans going through the Shaw system
12:25:35 5 and the delinquency report, and the relevant waived loan
12:25:39 6 categories are reflected in yellow on the chart. And look
12:25:43 7 at the steady growth of matured loans from, that were waived
12:25:48 8 from the first quarter of 2009 to the second quarter of 2009
12:25:54 9 and to the apex of the waiver practice, which is where the
12:25:58 10 charged conduct begins, in the third and fourth quarters of
12:26:01 11 2009. And what the chart shows is that by 2009, loans that
12:26:08 12 were made during the boom time, they had now become past
12:26:12 13 due. They weren't being extended. They were just being
12:26:15 14 waived. And so the little white lie that's referenced back
12:26:20 15 in September of 2009, now ten years later, that right there
12:26:24 16 is a matured loans beast.

12:26:27 17 And at the time of the charges, when the charged
12:26:31 18 conduct begins, we're not talking about \$1.1 million in
12:26:35 19 waived loans. We're not talking about \$2.7 million in
12:26:39 20 waived loans. We're not even talking about \$41 million in
12:26:43 21 waived loans. At the time that the charged conduct begins,
12:26:46 22 the number is almost \$300 million. It's a massive, massive
12:26:53 23 increase in matured loans that otherwise could not be
12:26:57 24 properly extended.

12:26:58 25 What else did we find out about the waiver

12:27:04 1 practice over the course of the trial? The waiver practice
12:27:06 2 applied to commercial borrowers, the riskiest type of
12:27:10 3 borrowers within the portfolio. Only commercial borrowers
12:27:14 4 were eligible for waived loans with commercial real estate
12:27:21 5 lending being the riskiest type of lending.

12:27:25 6 The defendants and the bank did not waive or
12:27:27 7 fail to report past due retail loans. If you recall from
12:27:33 8 Dr. Simmons' testimony last week, that comprised about
12:27:35 9 \$2.2 billion in loans within the portfolio, and Dr. Simmons
12:27:40 10 testified that with respect to delinquency report, there was
12:27:45 11 no evidence that home mortgages were being waived. There
12:27:47 12 was no evidence that credit card, credit card payments were
12:27:50 13 being waived. There was no evidence that auto loans were
12:27:53 14 being waived. The waiver practice applied to commercial
12:27:56 15 real estate loans and other types of commercial loans that
12:27:59 16 were among the riskiest types of loans within the bank's
12:28:04 17 portfolio.

12:28:04 18 We also saw evidence that the bank knew how to
12:28:09 19 follow the standard in terms of extending loans the right
12:28:13 20 way. And if you remember, the demonstrative that's being
12:28:21 21 shown on the screen right now came in through Larry Hart's
12:28:27 22 testimony.

12:28:28 23 And what Mr. Hart testified was based on an
12:28:30 24 analysis of the delinquency reports, the past due reports
12:28:32 25 and the Shaw system, in 2008, almost nine out of every ten

1 times the bank was able to extend loans before they ever
2 became past due. So nine out of ten times before a loan
3 ever hits its maturity date, the loan was extended.

4 Even as we get into 2009, a little bit more than
5 eight out of ten times, the bank was extending loans before
6 they reach their maturity date.

7 And what that shows is that the bank and its
8 employees knew how to extend loans the right way, but that
9 with respect to the loans that weren't extended, they either
10 could not or they chose not to do so. Those were the loans
11 that weren't extended. And they feed right into the chart
12 that you saw in terms of the massive growth of matured loans
13 that were waived. Now, what was the justification that you
14 heard for the waiver practice? It's that loans were current
15 for interest and "in the process of extension."

16 Let's talk about current for interest first.
17 You saw the Federal Reserve findings relating to working
18 capital lines of credit and the fact that those types of
19 lending practices could mask problem loans and delinquency
20 levels.

21 You saw the findings that the ten percent rule
22 could create undue repayment risk for the bank.

23 You saw that KPMG, the e-mail relating to KPMG,
24 the red flag and the subsequent e-mail about the Grand
25 Inquisitors.

12:30:13 1 You also heard evidence throughout the course of
12:30:16 2 the trial of supplemental financing that was keeping loans
12:30:20 3 current for interest.

12:30:24 4 And if you recall, this is Government's
12:30:28 5 Exhibit 1031-C, and it's a chart that came into evidence
12:30:32 6 that Mr. Hart prepared that just related to the third and
12:30:37 7 fourth quarters of 2009, situations where the bank
12:30:45 8 internally was making self-pays or cross-pays across
12:30:48 9 particular loans.

12:30:48 10 And what did Mr. Hart find? That there were 51
12:30:53 11 total loans totaling 1.3 -- \$103.5 million just during that
12:31:01 12 two-month time period. Now, as Mr. Hart testified, that's
12:31:06 13 only based on his review of payment histories and batch
12:31:09 14 sheets and certain loan documents. What doesn't it include?

12:31:13 15 It doesn't include other situations, anecdotal
12:31:18 16 situations like Mr. Fomunyam testified about, situations
12:31:20 17 where a working capital line of credit might have been made
12:31:24 18 to a real estate home builder and then that home builder was
12:31:27 19 sending in a check to make the payment. But just this alone
12:31:31 20 in the last two quarters of 2009, 51 loans totaling \$103.5
12:31:31 21 million.

12:31:41 22 The defendants put on their own summary witness,
12:31:42 23 Mr. Pelillo, who told you he only looked at one month of
12:31:46 24 batch sheets during the relevant time period, September of
12:31:49 25 2009, and that he was not told to look at payment histories

1 at all. But even with Mr. Pelillo's analysis, he identified
2 approximately \$55 million in loans that were supported by
3 supplemental financing.

4 In terms of process of extension, the evidence
5 has shown that there is zero due diligence in terms of
6 finding out whether or not loans were actually in the
7 process of extension.

8 Mr. Cummings testified that waivers were
9 automatic as long as loans were current for interest.

10 Mr. Conway testified about the walk-around, that
11 you heard a lot about the walk-around during the opening
12 statements of defense lawyers. Your recollection controls,
13 but Mr. Conway testified that the walk-around only related
14 to payments and billing errors, and he also told you that
15 it only takes one month to six weeks to actually extend a
16 loan.

17 You also heard, I think if you recall back to
18 opening statements, a lot of promises about how long it took
19 to get an appraisal at Wilmington Trust. Well, during
20 trial, Margery Stuart, who was in charge of the appraisal
21 group, testified it only took three to eight weeks even
22 during the bad point in the economy with the mean period of
23 about four to five weeks, not six months, not eight months,
24 not a year.

25 And, more importantly, the lack of due diligence

1 is apparent when you review the delinquency reports. And if
2 you recall, when Tosha Towe or Tosha Styles now testified
3 and there was all the sorting and the filtering and the use
4 of the spreadsheets, one of the things that happened during
5 her testimony was to show you how many days past due certain
6 loans were, where she went to the one column and clicked on
7 it, it went from Z to A, so it showed loans with the most
8 past due to the least.

9 And so it's a little difficult to see on the
10 screen, but this very first loan, 791 past due in the third
11 quarter of 2009. The second one, 655. The fourth one,
12 456 days past due. Every loan on the screen is more than
13 nine months past due, and it gets even worse in the fourth
14 quarter of 2009, where we have 67 loans that were waived
15 were more than nine months past due, 270 days or more past
16 due.

17 You heard from several bank employees who raised
18 concerns about the bank's use of waived loans to some of the
19 defendants. Marty Infanti testified that he told Bill North
20 that the waiver practice was not an appropriate way to
21 handle past due loans, and that it could have the impact of
22 the bank overstating earnings. Again, a recognition of
23 where the numbers are going to be reported and how they
24 would be relied upon.

25 Mr. Brewer testified that there were a number of

12:35:06 1 issues relating to matured loans in terms of making
12:35:10 2 advancements on matured loans and seeing other issues
12:35:14 3 relating to the practice that we'll talk about in a few
12:35:16 4 minutes.

12:35:17 5 Tosha Styles raised issues with respect to
12:35:24 6 matured loans with Mr. Gibson and Mr. North, and you'll see
12:35:28 7 an e-mail in a moment of what her reaction was when the
12:35:31 8 waiver practice finally ended.

12:35:33 9 And Karen Thuresson, Marty Infante's boss, she's
12:35:38 10 sent an e-mail in September of 2009. One of the recipients
12:35:43 11 is defendant North, and she notes, the level of loans which
12:35:46 12 have been matured 90 plus days needs to be better managed.
12:35:51 13 A maturity billing is a principal billing, and to the extent
12:35:54 14 the maturity is not addressed, principal is delinquent.
12:35:58 15 That delinquency grows until the loan is repaid or otherwise
12:36:01 16 extended. And she notes, we really need to get ahead of the
12:36:06 17 maturity on these loans.

12:36:07 18 So if there's an argument that defendant North
12:36:12 19 didn't know what the standard was in terms of matured loans
12:36:16 20 equaling a past due loan, he receives an e-mail from Ms.
12:36:19 21 Thuresson right there in September of 2009, and that has a
12:36:22 22 bearing on his knowledge, his intent, and his willfulness to
12:36:26 23 commit the charged offenses.

12:36:29 24 I mentioned the e-mail from Tosha Styles that
12:36:34 25 came into evidence, where she learns in July of 2010 that

12:36:38 1 the waiver practice is no more. The reaction is, I did it.
12:36:43 2 I did it. I only took ten years, but I did it, yay, with a
12:36:48 3 bunch of exclamations. And remember she raised concerns
12:36:54 4 about the waiver practice directly with Mr. North and
12:36:58 5 Mr. Gibson, relating to the fact that loan maturities were
12:37:01 6 staying on the list for such a long time period and that she
12:37:04 7 told him she thought that there should have been a renewal
12:37:09 8 period in a much more shorter time period.

12:37:11 9 But what happened? Well, the waived loans are
12:37:14 10 approved anyway. Steve Cummings testify that Bill North
12:37:17 11 would also approve the waiver of the loans either orally or
12:37:22 12 via e-mail, and here is an example of one of the e-mails
12:37:25 13 that came into evidence from March of 2010.

12:37:43 14 One of the issues that you are asked to decide
12:37:45 15 is whether the public reports excluding waived loans were
12:37:49 16 false, and the jury instructions note that an entry is false
12:37:57 17 if untrue when made. An entry may be false if it records a
12:38:02 18 transaction which did not occur or fails to record a
12:38:04 19 transaction which did occur and should have been accurately
12:38:07 20 reported or inaccurately reports a record or records a
12:38:11 21 transaction.

12:38:12 22 The evidence has shown that waived loans, the
12:38:18 23 waived matured loans equals false reporting. Several points
12:38:24 24 here. The first is the Court's instructions regarding the
12:38:27 25 reporting standards, they control.

12:38:31 1 Second, matured equals late for principal equals
12:38:36 2 past due, and we'll talk about loan contracts, the bank's
12:38:39 3 accounting system, the bank's policies, and the course of
12:38:42 4 conduct of the defendants and other bank employees in
12:38:47 5 recognizing that a matured loan was a past due loan.

12:38:50 6 And, third, common sense.

12:38:54 7 Let's start with the instructions. His Honor
12:39:00 8 referenced the past due status of matured loans under the
12:39:05 9 call report instructions for schedule RC-N. This is
12:39:09 10 Government's Exhibit 86-A, which was introduced into
12:39:14 11 evidence.

12:39:17 12 And the circumstance four of the call report
12:39:19 13 instruction states, the past due status of a loan or other
12:39:24 14 asset should be determined in accordance with its
12:39:26 15 contractual repayment terms. For purposes of the schedule,
12:39:32 16 grace periods allowed by the bank after a loan or other
12:39:35 17 asset technically has become past due but before the
12:39:38 18 imposition of late charges are not to be taken into account
12:39:41 19 in determining past due status. Remember we just saw a
12:39:49 20 slide that showed 67 loans that were more than 270 days past
12:39:53 21 due. That's a pretty long grace period.

12:39:55 22 Third, furthermore, loans, leases, debt
12:40:00 23 securities and other assets are to be reported as past due
12:40:03 24 when either interest or principal is unpaid in the following
12:40:06 25 circumstances. And, ladies and gentlemen, you should look

12:40:09 1 at the actual instructions and see that the word "or" is
12:40:12 2 underlined in the instruction. It's underlined there and
12:40:15 3 it's underlined in the next definition, and so compare that
12:40:19 4 underlined language and see if anything else is underlined
12:40:23 5 or emphasized in the rest of the instruction. It's showing
12:40:26 6 the emphasis that's being placed on the reporting.

12:40:28 7 Now, circumstance four states, single payment
12:40:33 8 notes, debt securities, and other assets providing for the
12:40:37 9 payment of interest at maturity are to be reported as past
12:40:39 10 due after maturity if interest or principal remains unpaid
12:40:43 11 for 30 days or more. And, once again, the word "or" is
12:40:50 12 underlined in the instruction.

12:40:53 13 Now, you'll have a chance to review Judge
12:40:57 14 Andrews' instructions relating to past due on the call
12:41:01 15 report. Those instructions control your deliberations,
12:41:05 16 but I've placed them on the screen, and they are on page
12:41:08 17 32.

12:41:08 18 And in the instruction it notes, the fourth
12:41:11 19 circumstance outlined under the definition covers the past
12:41:14 20 due status of loans that are past due because they have
12:41:18 21 matured. That is the loans are overdue for principal
12:41:23 22 repayment under the terms of a contractual loan agreement.

12:41:27 23 There is also a standard in the Court's
12:41:35 24 instruction that relates to past due for securities filings.
12:41:41 25 And way back when Donald Walker testified on, like, the

1 second or third day of trial, this exhibit was introduced,
2 which is Government's Exhibit 12, SEC Industry Guide 3. And
3 the industry guide notes, as of the end of each reported
4 period states separately, the aggregate of loans in each of
5 the following categories. And with respect to B, it says to
6 state specifically "accruing loans which are contract
7 contractually past due 90 days or more as to principal or
8 interest payments."

9 That definition is tracked in the instructions
10 that His Honor read you before closing arguments, and it
11 states, the past due section states that bank holding
12 companies must, as of the end of each reported period, state
13 separately the aggregate of accruing loans which are
14 contractually past due 90 days or more as to principal or
15 interest payments. It's virtually an identical standard to
16 what you saw in the call report.

17 And the last standard that applies that His
18 Honor instructed you on is the standard that applies to
19 financial statements within SEC filings, which boils down to
20 this. Tell the public your past due policy.

21 Another exhibit that came in through Mr. Walker
22 was the GAAP or the generally accepted accounting principle
23 relating to past due loans. And that evidence explained
24 that the summary under GAAP, the summary of significance
25 accounting policies shall include the following: "The

12:43:27 1 policy for determining past due or delinquency status (that
12:43:32 2 is, whether past due status is based on how recently
12:43:35 3 payments have been received or contractual terms)."

12:43:39 4 And then 50-7, once you state your policy, it
12:43:43 5 indicates that there's a disclosure that must be given, it's
12:43:49 6 required, the reported investment in loans past due 90 days
12:43:52 7 or more and still accruing.

12:43:54 8 And so Judge Andrews instructed you in
12:43:59 9 accordance with that particular definition, and that is
12:44:02 10 that an entity's summary of significant accounting policies
12:44:07 11 shall include the policy for determining past due or
12:44:11 12 delinquent status (that is, whether past due status is
12:44:14 13 based on how recently payments have been received or
12:44:17 14 contractual terms).

12:44:21 15 The evidence has shown that Wilmington Trust's
12:44:27 16 call reports and SEC reports and the one monthly regulatory
12:44:31 17 report were false. And so on the chart that we looked at
12:44:36 18 earlier, the yellow is all the waived matured loans.
12:44:41 19 Matured loan means past due for principal repayment.
12:44:45 20 Therefore, the non-inclusion of matured loans equals false
12:44:50 21 past due reporting. It's that simple.

12:44:53 22 The standards as instructed by the Court are
12:44:58 23 tied to the contractual repayment terms of the loan
12:45:05 24 agreement.

12:45:07 25 Now, during opening statements, you heard from

12:45:09 1 one of the lawyers for the defendant, "The bank can do
12:45:12 2 whatever it wants," and you saw a promissory note. In a
12:45:17 3 provision of the promissory note, in the general provisions
12:45:21 4 section and the argument is, a bank can extend a loan for
12:45:26 5 any reason it wants. The bank can essentially do whatever
12:45:29 6 it wants to do.

12:45:30 7 Well, that is not the whole story and it just
12:45:33 8 isn't true. That is only the promissory note. As you heard
12:45:39 9 testimony about, the promissory note was part of a larger
12:45:44 10 packet of documents, and they all fell under the terms of
12:45:50 11 the loan agreements. And every construction loan agreement,
12:45:54 12 commercial loan agreement at Wilmington Trust had a maturity
12:45:58 13 date, and it had a maturity date for a reason, because that
12:46:01 14 is the date when principal would be past due and owing.

12:46:06 15 And so on this example, which is a \$1 million
12:46:09 16 loan for the Bale Group, you see that the principal amount
12:46:13 17 was \$1 million, the loan date was April of 2006, and the
12:46:19 18 maturity date is April of 2009, which is consistent with the
12:46:22 19 testimony that you heard that most of the construction loans
12:46:24 20 were based on a three-year term.

12:46:30 21 Now, both parties would have to agree to the
12:46:34 22 essential terms of the construction loan agreement, and it's
12:46:40 23 not the easiest to see because of the small print within the
12:46:44 24 contract, but the loan agreement notes that it's made and
12:46:48 25 executed between the parties, the bank and the Bale Group,

12:46:52 1 and notes that it's made on certain terms and conditions.
12:46:57 2 It states that lender is willing to lend the loan amount to
12:47:00 3 borrower solely under the terms and conditions specified in
12:47:03 4 this agreement and the related documents. And we'll see
12:47:07 5 that term related documents defined in a moment.
12:47:09 6 It notes that the agreement is effective as of
12:47:13 7 April 13, 2006, and shall continue in full force and effect
12:47:18 8 until such time as all of the borrower's loans in favor of
12:47:22 9 lender have been paid in full.
12:47:24 10 So under the clear language of the contract,
12:47:28 11 this loan agreement is going to continue in force until the
12:47:31 12 bank is repaid.
12:47:34 13 There's a miscellaneous provision that relates
12:47:38 14 to how this contract can be changed, and it's really
12:47:41 15 important. And so in the amendment section it states, this
12:47:46 16 agreement with any related documents -- and, again, related
12:47:49 17 document is the note -- constitutes the entire understanding
12:47:52 18 and agreement of the parties as to the matters set forth in
12:47:56 19 this agreement. No alteration or amendment to this
12:48:03 20 agreement shall be effective unless given in writing and
12:48:05 21 signed by the party or parties sought to be charged or
12:48:09 22 bound.
12:48:10 23 Let me read that again. It states, no
12:48:13 24 alteration or amendment to this agreement shall be effective
12:48:16 25 unless given in writing and signed by the party or parties

12:48:22 1 sought to be charged or bound.

12:48:24 2 There is a note paragraph which states
12:48:30 3 specifically the word "note" means the promissory note, and
12:48:33 4 it references the \$1 million original principal amount from
12:48:38 5 the borrower, which was the Bale Group, to the lender
12:48:43 6 "together with all renewals of, extensions of, modifications
12:48:47 7 of, refinancings of, considerations of, and substitutions
12:48:51 8 for the promissory note or the agreement, explaining that
12:48:57 9 the commercial loan agreement is going to continue to run
12:49:02 10 enforced with respect to any extensions or later
12:49:09 11 modifications."

12:49:09 12 In the next paragraph it states, the words
12:49:11 13 "related documents" means all promissory notes.

12:49:15 14 This is a legal binding document. As you can
12:49:20 15 see, the commercial loan agreement is signed by both the
12:49:26 16 bank and the borrower. That's different from the promissory
12:49:28 17 note, which we will see in a moment.

12:49:31 18 Government's Exhibit 1603-A was the promissory
12:49:36 19 note for the Bale Group loan, and you'll see the principal
12:49:40 20 amount of \$1 million. The loan date the same, April 13th of
12:49:47 21 2006. The same maturity date as the commercial loan
12:49:50 22 agreement. And contained therein is a promise to pay, and
12:49:53 23 the promise is that the Bale Group "promises to pay to
12:49:56 24 Wilmington Trust Company the principal amount of \$1 million
12:50:00 25 or so much as may be outstanding together with interest on

12:50:04 1 the unpaid outstanding principal balance of each advance."

12:50:09 2 And in the next section in terms of payment,

12:50:11 3 borrower will pay this loan in one payment of all

12:50:14 4 outstanding principal plus all accrued unpaid interest on a

12:50:20 5 certain date.

12:50:22 6 Now, the promissory note indicates that the

12:50:27 7 borrower is still going to have to make interest payments

12:50:30 8 even after the maturity date. I mean, that's because the

12:50:33 9 bank is now out a million dollars to the Bale Group, and so

12:50:36 10 unless that loan goes on nonaccrual status or is charged

12:50:39 11 off, the bank is still going to charge interest. And so the

12:50:42 12 provision in the promissory note states, "Upon default,

12:50:46 13 including failure to pay upon final maturity." It's listed

12:50:50 14 as default under the terms of the promissory note. And,

12:50:55 15 moreover, a default is defined as borrower fails to make any

12:50:58 16 payment when due under this note.

12:51:02 17 As I mentioned, in connection with the loan

12:51:05 18 agreement, only the borrower signs the promissory note,

12:51:09 19 which is a related document to the loan agreement.

12:51:12 20 Ultimately, the commercial loan agreement controls

12:51:15 21 everything -- the loans, extensions or modifications to

12:51:22 22 that loan and all the terms or conditions of the promissory

12:51:24 23 note.

12:51:26 24 Those are the plain terms, the plain meaning of

12:51:29 25 the contracts that govern all of the loans that are at issue

12:51:33 1 in this case.

12:51:36 2 The bank's course of conduct, how they
12:51:38 3 considered those loan contracts, it's equally important for
12:51:41 4 you in determining whether the loans were contractually past
12:51:44 5 due.

12:51:45 6 So we heard testimony that matured loans equal
12:51:48 7 past due under the Shaw system, which nearly every witness
12:51:52 8 testified was the bank's commercial loan accounting system.

12:51:57 9 And so here is a snapshot from Shaw. It's
12:52:01 10 Exhibit 33. It's a little bit difficult to see. But the
12:52:05 11 next slide is an enlargement of a certain section of Shaw.
12:52:10 12 And you will see the very first loan that's on the
12:52:12 13 spreadsheet is the Bale Group. It's the loan that we just
12:52:16 14 looked at. It's a little bit more than a million dollars
12:52:18 15 past due for principal.

12:52:20 16 So under Shaw, every single one of the loans
12:52:24 17 that is listed in the enlarged section, they are all past
12:52:29 18 due. They're listed as past due in the Shaw system because
12:52:31 19 they have matured.

12:52:33 20 If you look at the past due interest column, all
12:52:35 21 of these loans are current for interest. And as I
12:52:39 22 mentioned, the very first loan is 5001, the Bale Group loan
12:52:43 23 that was originated April 13th of 2006 with a little bit
12:52:48 24 more than \$1 million due and owing.

12:52:51 25 That is the same that we just saw, the same

12:52:56 1 commercial loan agreement, Government's Exhibits 1603 and
12:53:00 2 1603-A. That loan was considered to be contractually past
12:53:04 3 due on the bank's internal loan accounting system.

12:53:08 4 Now, the very first witness that the Government
12:53:12 5 called in the case was Hickman Beckner. He is the guy that
12:53:16 6 worked for the Shaw system. And if you recall, Mr. Beckner
12:53:19 7 testified that the Shaw system could be customized. The
12:53:23 8 bank was sold the system in a certain way back in the
12:53:26 9 eighties or nineties, or whenever it was. It was well in
12:53:32 10 advance of this particular period.

12:53:33 11 And he testified the bank had the system for
12:53:36 12 years. And no one called up Hickman Beckner or any of his
12:53:39 13 colleagues at the Shaw system and said, hey, Hickman, can we
12:53:43 14 modify the Shaw system because these loans aren't actually
12:53:47 15 past due, because you see, we have a general provision in
12:53:49 16 the promissory note and we don't think the notes are past
12:53:52 17 due, so can we change the Shaw system? No. No one ever did
12:53:56 18 that.

12:53:56 19 And so on the bank's commercial loan accounting
12:53:58 20 system, the subledger, the Shaw system, every single one of
12:54:02 21 these loans that have matured and are current for interest
12:54:06 22 are considered to be past due.

12:54:07 23 Special Agent LoPiccolo did the summary chart of
12:54:13 24 all the various loan agreements that came in on one of the
12:54:16 25 last days of trial. It's Government's Exhibit 1038. And

12:54:21 1 you can take a look at that exhibit and see that the terms
12:54:25 2 of the commercial loan agreements and the promissory notes
12:54:28 3 remain consistent across all of the loans that are at issue
12:54:37 4 in this case.

12:54:37 5 Another reason why the bank's course of conduct
12:54:41 6 demonstrates that they thought that loans were contractually
12:54:45 7 past due comes from the bank's own policies. And so when
12:54:50 8 Marty Infantini testified, we introduced an exhibit that
12:54:54 9 related to the credit risk management policy at the bank,
12:54:59 10 and that required that there be signed documentation in
12:55:03 11 order to adjust loan information on the Shaw system.

12:55:06 12 And so it states, it references specifically
12:55:12 13 modifications to existing loans, and states, all required --
12:55:16 14 through this process, we confirm that proper approval was
12:55:20 15 obtained, conditions of the approval are met in the final
12:55:23 16 loan documents, all required documentation pertaining to the
12:55:26 17 transaction is received, documents are executed by the
12:55:31 18 appropriate parties, documents are properly dated, et
12:55:37 19 cetera.

12:55:37 20 Why even have a document review staff if you
12:55:42 21 don't have to review the signed documents? If the documents
12:55:46 22 don't matter, signed documents don't matter, if you can just
12:55:49 23 do oral extensions, why is this even relevant? Why do you
12:55:52 24 have to hire people to review documents to see if they've
12:55:55 25 actually been signed by the parties? And that's why if you

12:55:59 1 hear arguments later during the closing arguments of defense
12:56:03 2 counsel that you can do oral extensions of loan agreements,
12:56:06 3 or it was consistent with the defendants' understanding of
12:56:08 4 contractually past due loans at the time, the evidence
12:56:11 5 doesn't show that.

12:56:13 6 Under the delinquency report, and you've seen a
12:56:18 7 bunch of delinquency reports, the waived loans were listed
12:56:21 8 as matured. Specifically, they stated, matured in process
12:56:24 9 of renewal or for billing or collection errors. They aren't
12:56:29 10 listed in the column as oral extension with borrower. It
12:56:33 11 doesn't state in that last column, not past due per general
12:56:36 12 provision in the promissory note.

12:56:39 13 The loans were past due. They were matured.
12:56:42 14 The bill was due and owing. And there's an example of what
12:56:47 15 the comments were with respect to matured loans.

12:56:52 16 In addition, a waiver did not equal
12:57:00 17 "administrative issue under bank policy," and this is
12:57:03 18 another bank policy that came in through the testimony of
12:57:08 19 Martin Infanti, which notes that there were certain types of
12:57:12 20 past due loans that were excluded due to "administrative
12:57:16 21 issues."

12:57:17 22 And the only administrative issue that's listed
12:57:19 23 in the policy is internal misapplication of payments
12:57:23 24 received. There's no mention in the policy about waived
12:57:27 25 loans, and there's also no mention in the policy which

1 relates to the monitoring of past due loans that certain
2 loans weren't past due because of the general provision of
3 the promissory note. It's just not there.

4 You also saw evidence that the bank actually had
5 a temporary extension policy, and let's see what that said
6 in terms of signed documents.

7 The temporary extension policy can only be used
8 once, up to a total of 90 days from the maturity date, which
9 meant all of those 90-day past due loans, because they had
10 reached 90 days, none of them were eligible for the
11 temporary extension policy.

12 But importantly in terms of this concept of
13 whether documents have to be signed in order to extend a
14 matured loan, it notes that any extension to a matured loan
15 must be documented with a change in terms agreement signed
16 by the borrower. Again, nothing in the temporary extension
17 policy about oral extensions of loan agreements at
18 Wilmington Trust. And that's consistent with the testimony
19 of every single witness who was asked about it over the
20 course of trial.

21 In addition, when the bank reported past due
22 loans to the Federal Reserve, they actually included matured
23 loans. You heard Mr. Fomunyam testify that in advance of
24 the 2009 full scope examination, that the Federal Reserve
25 specifically requested that the bank provide a list of loans

12:59:06 1 that were 90 days or more past due and accruing. And what
12:59:10 2 did the bank provide? A list of loans where one, two,
12:59:14 3 three, four, five, six of them out of 17 on the list were
12:59:19 4 listed as past due by the bank because they had matured, and
12:59:23 5 some of them specifically referenced extension in process.
12:59:28 6 And that's why Mr. Fomunyam testified that he thought that
12:59:31 7 Wilmington Trust was reporting past due loans, because that
12:59:34 8 is the document that had been provided to the Federal
12:59:38 9 Reserve. All of this is consistent with the defendants' own
12:59:45 10 understanding of what was required to extend the loan.

12:59:49 11 What's on the screen right now is Government's
12:59:54 12 Exhibit 476-A, and it's a memorandum written by defendant
12:59:59 13 North in March of 2010, and you'll see this document quite a
13:00:03 14 bit today as well.

13:00:05 15 But importantly, for purposes now, where Mr.
13:00:08 16 North is talking about the bank having to go through another
13:00:11 17 round of short-term loan extensions, he writes, what will
13:00:15 18 also be imperative is that these extensions be followed up
13:00:19 19 by the full execution of any required documentation in order
13:00:23 20 to get these loans updated on Shaw.

13:00:27 21 And the followup e-mail between Mr. Harra and
13:00:33 22 Mr. North, where Mr. North describes, what we're talking
13:00:37 23 about, a change in terms for LaserPro deals were some sort
13:00:43 24 of modification. So even the defendants' own course of
13:00:48 25 conduct or own understanding is that you have to get signed

13:00:49 1 documents in order to extend the loan.

13:00:56 2 And it's a common sense proposition. Wilmington
13:01:01 3 Trust was an \$11 billion bank. It's not a lemonade stand.
13:01:06 4 It was a sophisticated entity where signed documents were
13:01:09 5 required.

13:01:10 6 And you also heard about uniformity across the
13:01:13 7 banking system why that was so important. Mr. Fomunyam
13:01:19 8 talked about in advance of examinations pooling peer group
13:01:23 9 averages, to see how Wilmington Trust was performing against
13:01:25 10 other banks.

13:01:26 11 Mac Hodgson testified the information in the
13:01:29 12 call report was so important because everyone reported it
13:01:32 13 out the same way. There wasn't any variation. And that's
13:01:36 14 consistent with the call report instructions, which note
13:01:39 15 that banks are required to prepare and file the call reports
13:01:42 16 in accordance with the instructions. And then if anyone has
13:01:48 17 any questions, just pick up the phone and call the Federal
13:01:50 18 Reserve and ask the question.

13:01:51 19 And, finally, before we take our lunch break,
13:01:55 20 one last slide. Think about it, ladies and gentlemen. No
13:01:59 21 written extensions would lead to chaos, because you would
13:02:03 22 have to have court proceedings with every single borrower to
13:02:08 23 determine, what is the maturity status?

13:02:10 24 And when Mr. Fomunyam and his fellow examiners
13:02:13 25 are in looking at a bank, remember, they're only in there

1 1 between a four to eight-week period. Every time that
2 2 Mr. Fomunyam and the asset quality examiners are looking at
3 3 a loan relationship, they would have to bring in the
4 4 borrower and the relationship manager, sit them both down in
5 5 a room and say, hey, borrower for Acme Corporation, what's
6 6 the maturity date? Hey, Mr. Terranova, what do you think
7 7 the maturity date is?

8 8 It just doesn't make any sense. It would be
9 9 chaos. Once again, it was an \$11 billion bank, and the
10 10 course of conduct at the bank was to require written
11 11 documentation to extend the loan agreement, and that's
12 12 because all of these loans were past due once they hit
13 13 maturity.

14 14 THE COURT: All right. Thank you, Mr. Kravetz.

15 15 So we'll take our lunch break until
16 16 2:00 o'clock.

17 17 And if we can take the jury out, please.

18 18 (The jury was excused for a luncheon recess.)

19 19 THE COURT: All right. So the plan will be when
20 20 we come back that Mr. Kravetz will go for however long he
21 21 goes until he finishes. That's when we take our afternoon
22 22 break.

23 23 Mr. Kelly, do I understand that you are first
24 24 after that?

25 25 MR. KELLY: Yes, Your Honor. I'm on deck.

13:04:00 1 THE COURT: And do you have a -- what's your
13:04:02 2 estimate right now of how long you'll be?
13:04:05 3 MR. KELLY: Under 90 minutes.
13:04:06 4 THE COURT: Okay. The reason I ask is because
13:04:11 5 I'm trying to figure out what will happen if Mr. Kravetz
13:04:16 6 goes on longer so that all things considered, not to have
13:04:26 7 your argument be broken up, part today, part tomorrow.
13:04:30 8 MR. KELLY: Well, I don't know how much longer
13:04:31 9 Mr. Kravetz has, Your Honor.
13:04:33 10 MR. KRAVETZ: I think I will be past 3:30.
13:04:35 11 THE COURT: All right. Well, thank you.
13:04:38 12 MR. KELLY: A short break, that might do it.
13:04:40 13 THE COURT: Well, I guess what I'm wondering is,
13:04:42 14 I would think I could ask the jury are they willing to stay
13:04:46 15 a little bit later, because I would like, if you are
13:04:51 16 starting at quarter of 4:00 or something, you think you're
13:04:54 17 going to be 90 minutes, my preference overall would be to go
13:04:58 18 to 5:15 and be done with you.
13:04:59 19 MR. KELLY: I think I can do that, Your Honor.
13:05:01 20 THE COURT: Okay. All right. All right.
13:05:07 21 Anything else?
13:05:08 22 MR. KRAVETZ: No, Your Honor.
13:05:10 23 MR. BRENN: No, Your Honor.
13:05:11 24 THE COURT: Thank you. We'll be in recess.
13:05:17 25 (Luncheon recess taken.)

13:56:04 1 - - -

13:56:04 2 Afternoon Session, 2:00 p.m.

14:00:44 3 THE COURT: All right. Everyone be seated.

14:00:46 4 Are you ready?

14:00:47 5 MR. KRAVETZ: Yes, Your Honor. If I'm watching

14:00:50 6 the clock, what is the afternoon timing for the break?

14:00:52 7 THE COURT: Well, I was going to really just try

14:00:55 8 and do it whenever you reached an end.

14:00:57 9 MR. KRAVETZ: Okay.

14:00:58 10 THE COURT: But if it gets to be 3:30 and you've

14:01:00 11 got an hour in you --

14:01:01 12 MR. KRAVETZ: Okay.

14:01:02 13 THE COURT: -- just declare your own break.

14:01:04 14 MR. KRAVETZ: Okay. Thank you.

14:01:05 15 THE COURT: I will remember that.

14:01:06 16 MR. KRAVETZ: Thank you, Your Honor.

14:01:07 17 THE COURT: Mr. Kravetz, do you expect to go

14:01:33 18 much beyond 3:30?

14:01:35 19 MR. KRAVETZ: A little bit.

14:01:36 20 THE COURT: If we're talking like quarter of

14:01:37 21 4:00, just go to quarter of 4.

14:01:39 22 MR. KRAVETZ: If I know where I am, I will take

14:01:41 23 the break.

14:01:41 24 THE COURT: All right. Use your best judgment.

14:01:43 25 MR. KRAVETZ: Thank you.

14:03:48 1 (The jury entered the courtroom.)

14:03:50 2 THE COURT: All right. Members of the jury,

14:04:45 3 welcome back. Everyone, you may be seated.

14:04:48 4 Mr. Kravetz, you may continue.

14:04:49 5 MR. KRAVETZ: Thank you, Your Honor. Good

14:04:51 6 afternoon.

14:04:51 7 We left off talking about the falsity standard

14:04:56 8 under which you'll evaluate whether past due loan reporting

14:05:00 9 was false under the call reports and the SEC reports, and

14:05:03 10 you may hear argument from the defense attorneys about a

14:05:08 11 document that was introduced on the last day of trial. It

14:05:13 12 was a Q&A web page that came from the Office of Thrift

14:05:17 13 Supervision, an agency that doesn't exist anymore, that's

14:05:20 14 now part of a different federal agency.

14:05:22 15 Ladies and gentlemen, there is no evidence that

14:05:25 16 the defendants relied on or even knew about the OTS web

14:05:31 17 page, none. Let's go over what we know about it.

14:05:33 18 The OTS web page that came into evidence, it's

14:05:39 19 Defense Exhibit 5541-A. The date at the bottom right-hand

14:05:44 20 corner is February 13th, 2012. It's at least a

14:05:49 21 year-and-a-half, almost two years after all of the conduct

14:05:53 22 at issue in this case.

14:05:56 23 You heard that this is not a document that came

14:05:58 24 from any of the defendant's desk files, like we saw with

14:06:02 25 some of the exhibits from Ms. Rakowski and Mr. Gibson.

14:06:07 1 Moreover, it wasn't a document that was produced by the bank
14:06:10 2 or Federal Reserve or KPMG because there's no Bates number
14:06:13 3 on the bottom right-hand corner. We all know about Bates
14:06:18 4 numbers. There aren't any markings on this particular
14:06:21 5 document.

14:06:21 6 How did this document become introduced into
14:06:24 7 evidence? It was introduced by a lawyer who works with
14:06:27 8 Mr. Gibson's lawyers and testified that she received it from
14:06:30 9 those lawyers and then read that as well as the other
14:06:33 10 documents into the record.

14:06:35 11 There is no evidence that this document came
14:06:38 12 from any of the four defendants, that they knew about it, or
14:06:44 13 they relied on it.

14:06:45 14 Let's also look at the substance. What does the
14:06:48 15 Q&A say? Two really important points talking about
14:06:53 16 construction loans at maturity. And in reference to
14:06:57 17 informal extensions, it talks about the extension should be
14:07:00 18 for a limited and reasonable length of time, and that the
14:07:04 19 bank should get the extension in writing.

14:07:08 20 Where have we seen that before? The bank's own
14:07:11 21 temporary extension policy, which talked about only having a
14:07:14 22 temporary extension up to 90 days and the requirement that
14:07:18 23 any extension be documented with a change in terms agreement
14:07:22 24 signed by the borrower.

14:07:23 25 In addition, the date of the Q&A, not just the

14:07:28 1 2012 date as being relevant, the 2002 date is relevant
14:07:33 2 because you might hear, well, there's language in the Q&A
14:07:36 3 that looks pretty similar to language used in the waiver
14:07:38 4 practice.

14:07:39 5 Remember that defendants introduced a document
14:07:41 6 from 1999 that we saw earlier that had the waiver language
14:07:46 7 back then. So unless someone traveled to the future, got
14:07:49 8 the OTS language and then went back in the past, no one
14:07:52 9 relied on this language for the waiver practice let alone
14:07:55 10 the defendants. There is no evidence at all that any of the
14:08:00 11 defendants ever saw the Q&A let alone relied on it.

14:08:06 12 So we end the section on falsity and past due
14:08:10 13 loans with a few points to consider. If the loans weren't
14:08:15 14 past due, why waive them? There's no reason to waive a loan
14:08:19 15 if it's not past due. If the loans weren't past due, why
14:08:23 16 stop waiving them, because at some point, the waiver
14:08:25 17 practice ends, finally, the second quarter of 2010.

14:08:29 18 And if the loans weren't past due, why
14:08:32 19 mass-extend them? Why would you ever have to extend a loan
14:08:36 20 that wasn't past due?

14:08:38 21 And that brings us to Wilmington Trust's past
14:08:43 22 due reporting during the relevant time period. As Ms. Wolf
14:08:48 23 indicated in her opening statement, Wilmington Trust
14:08:52 24 operated with two sets of books relating to past due loans,
14:08:56 25 and you saw evidence of that throughout the trial.

14:09:01 1 So the first enlargement on the screen is a
14:09:03 2 cutout of the bank's 2009 delinquency report. It is
14:09:07 3 Government Exhibit 53. And you will note in the top
14:09:12 4 portion, the waivers are blank, and as Ms. Towe testified,
14:09:16 5 this is one of the pivot tables that was created. What's
14:09:20 6 shown on the screen right now does not include the waived
14:09:22 7 loans, because there is no "Y" in the waiver column.

14:09:25 8 In the bottom right of the screen now is the
14:09:28 9 September 2009 past due and nonperforming loan report,
14:09:33 10 which was prepared by the controller's group led by Ms.
14:09:36 11 Rakowski.

14:09:37 12 As you'll see, the delinquency report with the
14:09:41 13 waived loans blank fed directly into the past due and
14:09:47 14 nonperforming loans report. And Mr. Hart testified how he
14:09:50 15 went through this process with respect to all of the
14:09:52 16 delinquency reports and the past due reports.

14:09:53 17 What is missing? The waived loans are missing.
14:10:00 18 And you see the difference when the pivot changes from blank
14:10:03 19 to Y, and now instead of 17 million plus in waivers, the
14:10:08 20 number jumps up significantly, well over \$300 million.

14:10:12 21 And then what happens? The waived loans are not
14:10:18 22 reported in the SEC reports. In the bottom right-hand
14:10:21 23 portion of your screen, you'll see management's discussion
14:10:23 24 and analysis. It's the period ended September 30, 2009, and
14:10:30 25 what's reported in the SEC reports is information not

14:10:32 1 including the waived loans.

14:10:34 2 Similar to the call report. You'll see on the
14:10:38 3 screen now the way that the information is filtered is,
14:10:40 4 waived blank in bank one, because bank one was the Delaware
14:10:44 5 bank, Wilmington Trust Company.

14:10:46 6 And so here, the blank with the bank one
14:10:51 7 compared to the internal call report reconciliation
14:10:54 8 document, they match. The same question: What is missing?

14:11:01 9 The waived loans. And look at the difference when that
14:11:04 10 pivot table is filtered to include the loans that had
14:11:07 11 matured but were waived. A significant amount, \$369 million
14:11:12 12 total in terms of the call reporting.

14:11:17 13 Now, Mr. Hart testified about the chart, and
14:11:23 14 this is now the second or third time that we have seen it,
14:11:26 15 but the chart is showing from left to right the impact of
14:11:30 16 the waiver practice on public reporting in 2009.

14:11:34 17 So the blue bar chart is what was reported in
14:11:38 18 the SEC filings for the first, second and third quarters
14:11:41 19 of 2009, and the bank's annual report at the end of the
14:11:46 20 year.

14:11:46 21 And the yellow represents the relevant waived
14:11:48 22 loans, so these were loans that were waived as current for
14:11:52 23 interest, in the process of extension, and not including any
14:11:57 24 loans in loan recovery.

14:12:00 25 Once again, it shows the waiver practice goes

1 from the little white lie to the matured loans beast. And
2 also importantly is, there's no evidence that there are any
3 steps to determine why these loans were current for
4 interest, or if some of the problems identified by the
5 Federal Reserve in the course of the 2009 examination have
6 been remedied or not.

7 Now, Mr. Hart also displayed another version of
8 the chart focusing just on the third and the fourth quarters
9 of 2009, and you can see from this particular chart that in
10 the third quarter of 2009, the bank reported \$17.4 million
11 in past due loans in its SEC report. A total of \$297
12 million of relevant loans were waived. Look at the numbers
13 though of loans that were six months or more past due,
14 \$139.3 million. \$83 million worth of loans were nine months
15 or more past due.

16 And then going across to the next bar chart, the
17 bank reports \$10.9 million in past due 90-day loans in its
18 10-K for 2009. \$303 million worth of relevant waived loans.
19 The number jumps now to \$160 million in loans that are now
20 more than six months due and still waived, and \$86 million
21 in loans that are nine months or more past due and waived.
22 And this is further evidence that there was no due diligence
23 with respect to whether these loans were actually in the
24 process of extension. The evidence has shown it doesn't
25 take six months to extend a loan let alone nine months let

14:13:47 1 alone a year. And you saw earlier, the call report
14:13:50 2 instructions, there is no grace period let alone six months
14:13:54 3 or six months.

14:13:55 4 The next chart shows the impact of the waiver
14:14:00 5 practice on the third and fourth quarter of 2009 call
14:14:04 6 reports, and for purposes of your determinations, the third
14:14:08 7 quarter 2009 call report, Counts 7 and 11 in the overall
14:14:14 8 conspiracy count, and the fourth quarter of '09, the counts
14:14:17 9 are Counts 8 and 12.

14:14:21 10 And look at the difference in terms of call
14:14:22 11 report reporting. The blue represents what was reported
14:14:24 12 in the relevant line items for purposes of the call report.
14:14:29 13 17.1 million versus \$296 million worth of relevant waivers.
14:14:36 14 And in the fourth quarter, a little bit over 8.5 million
14:14:40 15 versus 296 million of waived loans.

14:14:44 16 And then we look at the first quarter of 2010,
14:14:48 17 where in its Form 10-Q, the bank doesn't include
14:14:53 18 approximately \$32 million worth of waived loans, and \$31
14:14:57 19 million worth of waived loans in the call report.

14:15:00 20 Now, why is the number lower in the first
14:15:02 21 quarter of 2010? Well, remember, and we'll get to this in a
14:15:08 22 few minutes, that's when you have a lot of short-term
14:15:10 23 extensions at year 2009, and the bank was still and the
14:15:15 24 defendants were still waiving loans.

14:15:17 25 And finally, the waived loans continued through

14:15:21 1 2010. This is a defense exhibit showing that even at the
14:15:23 2 end of the second quarter of 2010, at a period in time when
14:15:27 3 the bank is going to be rated a five by the Federal Reserve
14:15:30 4 according to the chart that came in through the defense
14:15:33 5 witness, \$83 million worth of loans were still waived then,
14:15:39 6 six months after year-end 2010.

14:15:42 7 That brings us to the mass extension process, or
14:15:52 8 as what's termed on the slide, extend and pretend.

14:15:57 9 In 2009, the evidence has shown that the waived
14:16:01 10 loans became overwhelming. We saw the e-mail before from
14:16:05 11 Mr. Conway, reflecting that the reality today is the number
14:16:09 12 overwhelming given the time, resources and existing
14:16:14 13 processes for, the process for renewal.

14:16:17 14 Now, it's overwhelming as of June 11, 2009, but
14:16:24 15 we know from the record that the bank is required by the
14:16:27 16 Federal Reserve as of October 21st of 2009 to start
14:16:30 17 reporting past due loans on a monthly basis directly to the
14:16:35 18 Federal Reserve in the aftermath of a very critical
14:16:38 19 examination.

14:16:40 20 So what happens? A group of bank employees are
14:16:43 21 tasked with getting together to discuss "the process and
14:16:47 22 strategy to eliminate matured loans by 12/31," and as it's
14:16:52 23 written in the calendar invite for Mr. Conway and Mr. North
14:16:56 24 and Mr. Bailey and Mr. Terranova are attendees. It is
14:17:01 25 extremely important that we talk about matured loans and how

14:17:03 1 we can make them go away by 12/31. This cannot be a quick
14:17:09 2 fix for 90 or 120 days as the problem will just return.
14:17:14 3 Now, remember that last slide. It was
14:17:16 4 overwhelming in June with those numbers and back to the
14:17:22 5 chart as the number even grows higher in the third and
14:17:25 6 fourth quarters of 2009, but all of a sudden, the decision
14:17:28 7 point comes down that the loans have to be "eliminated" by
14:17:33 8 the end of the year. And that's reflected in e-mails. The
14:17:39 9 understanding was, try to extend all of the matured loans by
14:17:43 10 year-end 2009.

14:17:46 11 And so another e-mail that goes out relating to
14:17:49 12 the list of matured and maturing loans talks about, these
14:17:53 13 are the loans that have already matured and those maturing
14:17:56 14 by 12/31/09. As of 12/31/09, we can no longer do that, so
14:18:04 15 we must take care of all of these by 12/31.

14:18:07 16 So the initial understanding, this all has to be
14:18:09 17 taken care of by 12/31 of '09. On this list alone, 804
14:18:14 18 loans totaling \$1.3 billion are going to have to be
14:18:20 19 "eliminated" in about a two-month time period.

14:18:23 20 Another e-mail, Exhibit 626 and 626-A. This is
14:18:27 21 an e-mail that Mr. Terranova sends out to his lenders with
14:18:30 22 the same list that Mr. Conway sent, but it has been modified
14:18:35 23 to just include the Delaware CRE loans. And the
14:18:38 24 understanding is, senior management is requiring that all
14:18:40 25 matured loans be acted upon prior to 12/31/09. This will

14:18:46 1 include execution of CITAs, or change in terms agreements as
14:18:50 2 well.

14:18:50 3 And they note further, our goal should be to
14:18:55 4 extend most facilities for at least one year. Senior
14:18:58 5 management does not want to see a flood of 90-day extensions
14:19:01 6 in December, which just pushes back the process. Short-term
14:19:04 7 extensions should be the exception, not the norm.

14:19:12 8 That list contained 386 loans totaling
14:19:16 9 \$570 million. That's Delaware CRE loans, just Delaware CRE
14:19:24 10 alone, the riskiest types of loans within the portfolio and
14:19:27 11 the specific bank that has had the most criticism from the
14:19:34 12 Federal Reserve.

14:19:35 13 Now, the next e-mail is Defense Exhibit 3129,
14:19:39 14 and I would ask that you keep this e-mail in mind as
14:19:44 15 you consider the testimony of Terry Brewer and the
14:19:47 16 information that he provided to you over the course of
14:19:51 17 a day-and-a-half.

14:19:52 18 This is an e-mail from Mr. Brewer to Mr. North
14:19:55 19 in August of 2008. So we're talking almost a
14:19:59 20 year-and-a-half before the mass extensions at year-end 2009.

14:20:06 21 And Mr. Brewer writes specifically about renewal
14:20:09 22 extensions. "While I know Steve is working on changing the
14:20:13 23 form, I still can't understand how a renewal can occur or be
14:20:16 24 presented without a review of the current collateral and an
14:20:21 25 understanding of the borrower's/sponsor's cash flow.

14:20:26 1 Somehow this must start being included."

14:20:33 2 And keep this in mind, ladies and gentlemen, as
14:20:36 3 you see what actually happens at year-end 2009, because it
14:20:40 4 certainly isn't this.

14:20:42 5 Now, if Mr. Brewer couldn't understand how
14:20:44 6 that was the process that could occur in August of 2008,
14:20:48 7 fast-forward to November of 2009, where now there are a
14:20:53 8 number of matured loans that don't have updated appraisals.
14:20:58 9 And it's November 19th of 2009. And the bank has no idea
14:21:03 10 what is the collateral values of these loans, a number
14:21:07 11 of which had not been updated via appraisals in several
14:21:11 12 years.

14:21:11 13 And so Mr. Brewer writes now, November of 2009,
14:21:15 14 on expired yields where we are waiting appraisals to
14:21:18 15 complete our credit underwriting for renewal, meaning, we
14:21:22 16 don't have the information going back to the standard from
14:21:25 17 August of 2008. We will extend those loans until March 1st
14:21:28 18 of 2010.

14:21:31 19 So Mr. Brewer didn't understand how this is
14:21:37 20 something that was appropriate back in August of 2008,
14:21:42 21 but yet he gives in and decides to extend on a short-term
14:21:46 22 basis, on a mass basis, a number of loans any way at
14:21:49 23 year-end 2009.

14:21:51 24 And why is that? Well, the evidence shows
14:21:53 25 that he gives in and the bank does it anyway because the

14:21:58 1 problem is just too big. The task is impossible. There's
14:22:01 2 no way that you can extend 386 of the riskiest loans in the
14:22:07 3 bank's lending portfolio in less than two months. So we
14:22:12 4 moved from waivers into extend and pretend.

14:22:18 5 And Mr. Brewer testified about what went into
14:22:23 6 the mass temporary extensions at year-end 2009, and as a
14:22:30 7 juror, you can evaluate the demeanor and the way that a
14:22:35 8 witness presented himself or herself on the stand, and you
14:22:39 9 can consider Mr. Brewer's testimony and how he had to be
14:22:43 10 shown a document for every single answer by Ms. Wolf as
14:22:47 11 compared to how he was answering questions that were posed
14:22:49 12 to him by defense counsel. But even as uncomfortable as
14:22:54 13 Mr. Brewer was on the stand, he reluctantly acknowledged all
14:22:58 14 of the things on the slides. That the waiver practice made
14:23:02 15 him uncomfortable. That there was no robust underwriting
14:23:05 16 that went into underwriting decisions at year-end. He
14:23:09 17 referred to it twice as a superficial review process. He
14:23:13 18 called it a touch. There's an e-mail that describes that
14:23:17 19 loans were mass extended to "allow for the proper needed
14:23:22 20 level of underwriting."

14:23:24 21 And you can infer from the evidence that you
14:23:27 22 have received that there was no meaningful due diligence to
14:23:30 23 extend loans on a mass basis at year-end 2009. Loans were
14:23:34 24 missing documents and appraisals. Massive loan
14:23:37 25 relationships, like the Reybold relationship were extended

14:23:42 1 the same day or the next day. \$86 million. You know, a lot
14:23:46 2 of questions were asked to Mr. Terranova about the Reybold
14:23:50 3 relationship.

14:23:51 4 Remember what Mr. Brewer testified. He actually
14:23:53 5 went out and visited Meridian Crossing and some of the
14:23:56 6 Reybold projects. He testified that he understood the state
14:23:59 7 of those projects, and I know that there was an argument to
14:24:06 8 put everything on that relationship on Mr. Terranova. But
14:24:08 9 in one day, close to \$100 million worth of that relationship
14:24:12 10 was mass extended, and we'll see an e-mail in a few minutes
14:24:15 11 about what the true state of the Reybold relationship was as
14:24:19 12 of early 2010.

14:24:21 13 So mass extensions are basically just a new
14:24:26 14 version of the waiver practice, but the defendants still
14:24:30 15 waived \$303 million worth of matured loans at year-end
14:24:36 16 2009.

14:24:36 17 So mass extensions beg certain key questions.
14:24:42 18 First, if nothing was wrong with the waiver practice, why
14:24:46 19 change it?

14:24:48 20 Second, if you know how to properly extend
14:24:51 21 loans, why not do it the right way?

14:24:53 22 And, third, why not just tell the public that
14:24:58 23 these loans are past due? I mean, wasn't that the plan to
14:25:01 24 begin with, with some of the initial e-mails that come out
14:25:04 25 in late October, early November? We're going to do this by

14:25:07 1 12/31/09. We don't want to have short-term extensions at
14:25:12 2 year-end. That's the original plan, but the problem became
14:25:15 3 too big that the defendants did not follow it, and that's
14:25:22 4 because it was impossible to meaningfully extend that many
14:25:26 5 matured loans.

14:25:31 6 Mr. Brewer sends out an e-mail in which Mr.
14:25:34 7 North is copied on January 6th of 2010. This is less than a
14:25:40 8 week after the start of a new year 2010, and this is what
14:25:45 9 Mr. Brewer talks about the loans that have been mass
14:25:47 10 extended. We have a huge number of loans that have been
14:25:52 11 temporarily extended until 4/1/10. The vast majority of
14:25:56 12 these loans need to be actively touched (evaluate and
14:25:59 13 negotiated for needed modifications), meaning they didn't do
14:26:02 14 anything meaningfully. They just kicked the can down the
14:26:05 15 road.

14:26:06 16 And he states further that the economy has
14:26:10 17 adversely impacted the vast majority of our development
14:26:14 18 project, and we need to address material weaknesses. In
14:26:19 19 my mind, this yet is to be the biggest and most important
14:26:23 20 task that we need to undertake in the Delaware real estate
14:26:26 21 world.

14:26:27 22 And then he notes that we have "huge loan
14:26:34 23 maturity issues," just less than a week after they mass
14:26:36 24 extended hundreds of millions of dollars worth of loans.

14:26:42 25 And Government's Exhibit 418, and you'll see

14:26:45 1 this is an e-mail that all four of the defendants are on
14:26:49 2 this particular e-mail. And the bottom portion that is
14:26:53 3 called out is an e-mail, a portion of the e-mail written by
14:26:56 4 defendant North. And he's writing about the extensions, and
14:26:59 5 he talks about, we did a lot of extensions until April 1st,
14:27:04 6 2010 "so as to allow for the proper/needed level of
14:27:09 7 underwriting required on the CRE credits." They didn't do
14:27:14 8 what was required. They just pushed the loan dates out by
14:27:18 9 three months.

14:27:19 10 And then Mr. North writes further, The goal is
14:27:22 11 that by April 30th, we will have gotten through all of
14:27:25 12 these, with any needed structural changes, "supported by
14:27:29 13 authority low analysis/underwriting in order to avoid an
14:27:34 14 annual tidal wave of maturities in the future."

14:27:39 15 Clearly, the understanding of the defendants --
14:27:41 16 and, again, this is an e-mail in early January of 2010. All
14:27:47 17 of the defendants are on the e-mail, no idea that some day
14:27:51 18 this e-mail is going to be shown in the midst of a criminal
14:27:53 19 trial. And it notes that the bank and the defendants did
14:27:56 20 not do the type of thorough analysis and underwriting that
14:27:59 21 was required to extend loans.

14:28:01 22 These were bad loans. That's why. They just
14:28:10 23 couldn't meaningfully extend them and there were problems
14:28:13 24 within the loan portfolio.

14:28:15 25 And, once again, don't take my word for it.

14:28:18 1 Look at the evidence. An e-mail from Mr. North to
14:28:22 2 Mr. Harra, December 16, 2009, in which Mr. North refers to
14:28:26 3 loans that were extended as "credit turds." Many of these
14:28:30 4 credit turds will simply take some time to make or get
14:28:33 5 better.

14:28:38 6 An e-mail from Mr. Brewer talking about certain
14:28:40 7 loan relationships that were extended. Once again, this is
14:28:44 8 an e-mail from early January 2010, referring to the Reybold
14:28:48 9 relationship, which was signed one day after, received the
14:28:54 10 loan documents. It notes, it had a negative monthly cash
14:28:57 11 flow of something north of \$300,000. And he noted during
14:29:00 12 his testimony, that would be pretty much losing \$3.6 million
14:29:04 13 worth of cash throughout the calendar year.

14:29:08 14 P.J. Bale, that lending relationship we've heard
14:29:12 15 a lot about over the course of the trial. It's referred to
14:29:14 16 by Mr. Brewer as "speculative development."

14:29:23 17 What else do we know from the evidence that all
14:29:28 18 of the defendants know? And, again, all of the defendants
14:29:30 19 are copied on this e-mail. It's an e-mail dated
14:29:34 20 January 25th of 2010.

14:29:37 21 If you recall, Mr. Brewer testified about the
14:29:40 22 surge, the "troop surge" where they brought lenders down
14:29:44 23 from Pennsylvania and up to Maryland because the Delaware
14:29:47 24 lenders didn't have the time, the resources or the
14:29:52 25 capabilities to get their arms around the lending portfolio.

14:29:54 1 And one of the goals of the surge process was to take a look
14:29:59 2 at loans that had been extended on a short-term basis at
14:30:01 3 year-end.

14:30:02 4 So here we are now, January 25th of 2010,
14:30:07 5 and now bank employees are starting to look at these
14:30:09 6 loans and talking about the impact of the surge on risk
14:30:13 7 rating.

14:30:14 8 And just 25 days into the month in January of
14:30:17 9 2010, the recommendation is from the first wave of the surge
14:30:23 10 results, that there are going to be \$446 million worth of
14:30:28 11 loan downgrades just in the first 25 days of a month. This
14:30:33 12 is the information that all of the defendants have and it's
14:30:37 13 in late January of 2010.

14:30:40 14 Count 2 of the indictment charges the defendants
14:30:49 15 with securities fraud, and His Honor instructed you as to
14:30:54 16 what the standard is in terms of the scheme to defraud.
14:30:58 17 That it's any plan, device, or course of action to deprive
14:31:02 18 another of money or property by means of materially false or
14:31:05 19 fraudulent pretenses, representations or promises reasonably
14:31:09 20 calculated to deceive persons of average prudence.

14:31:13 21 And there's an additional instruction in terms
14:31:17 22 of what can include a false statement.

14:31:20 23 Now, under the scheme to defraud instructions,
14:31:27 24 the Government is not required to prove that a particular
14:31:29 25 defendant originated the fraud scheme. It's not necessary

14:31:32 1 that the Government prove that a defendant actually realized
14:31:35 2 any gain from the scheme, or that any intended victim
14:31:38 3 actually suffered any loss.

14:31:41 4 But you may consider whether the scheme
14:31:43 5 succeeded in determining whether it actually existed.

14:31:48 6 And what was the scheme? The scheme was to lie
14:31:51 7 about the bank's past due loans and related disclosures in
14:31:54 8 connection with the February of 2010 capital raise.

14:32:00 9 What was the purpose or benefit of the scheme?

14:32:03 10 Essentially, at that time it was to keep the bank, which was
14:32:06 11 in deep trouble, afloat. It was to provide a benefit to the
14:32:09 12 bank through the capital raise.

14:32:12 13 And you can infer from the evidence that as of
14:32:17 14 February 22nd of 2010, the bank was in trouble, and the
14:32:21 15 defendants -- the investors did not know the true condition,
14:32:24 16 the true financial condition of the bank, particularly,
14:32:28 17 focused particularly on its reporting of 90-day past due
14:32:31 18 loans. And the investors ultimately invest \$287 million in
14:32:37 19 a capital raise.

14:32:39 20 When is all of this happening? Just to follow
14:32:42 21 the timeline, we've just seen a number of e-mails from
14:32:44 22 October, November, December of 2009, January of 2010. Well,
14:32:50 23 remember the Fed came back for a target exam in January of
14:32:53 24 2010. It commenced on January 4th and concluded on
14:32:59 25 January 29th of 2010. And all of the information that we

14:33:04 1 have just discussed, all of the e-mail results, everything
14:33:07 2 relating to the surge process and mass extensions, that is
14:33:11 3 all information that the defendants knew at the time that
14:33:14 4 the Federal Reserve was onsite in January of 2010. And the
14:33:17 5 testimony from Mr. Corkery, Mr. Fomunyam, is that none of
14:33:21 6 the defendants said a word about it. In fact, the testimony
14:33:24 7 from Mr. Fomunyam is, he didn't realize that the bank had
14:33:27 8 engaged in a number of short-term extensions until he came
14:33:30 9 back in the summer of 2010 and noticed it in the course of
14:33:35 10 credit file reviews, and he told you how he raised it in a
14:33:38 11 meeting and said that it had the potential to mask the
14:33:42 12 reporting of past due loans.

14:33:44 13 Also focusing on the context, you'll see on the
14:33:50 14 screen Government's Exhibit 435. This is the, one of the
14:33:54 15 offering documents from JP Morgan. And you heard Michael
14:33:58 16 Schechter, who was the book runner from JP Morgan, who came
14:34:01 17 in and testified about the process of raising capital for
14:34:04 18 the bank, and that there was an organizational meeting on
14:34:07 19 February 1st of 2010, that Mr. Gibson and Ms. Rakowski
14:34:12 20 attended, and that there was a business due diligence
14:34:15 21 meeting on February 11th of 2010 that was attended by Mr.
14:34:19 22 North and Mr. Harra.

14:34:20 23 And this particular document listed all of the
14:34:25 24 due diligence questions that the underwriters asked in
14:34:28 25 connection with the process before the capital raise. And

14:34:33 1 some are really important.

14:34:34 2 So there's a question, please discuss credit
14:34:38 3 under writing guidelines, any recent or contemplated
14:34:43 4 changes. Please discuss loan modification programs. That
14:34:47 5 would have would have been a nice time to tell the
14:34:50 6 underwrite what had happened with the short-term extensions.
14:34:52 7 Any improvements in 30-day delinquency by portfolio and what
14:35:00 8 percentage of your construction loans have interest reserves
14:35:02 9 and are currently servicing interest payments?

14:35:04 10 And if you recall during the trial when that
14:35:07 11 document was up on the screen, one of the counsel for
14:35:09 12 defendant Harra asked Mr. Schechter, well, mass extensions,
14:35:15 13 all the banks were doing it at the time, weren't they? And
14:35:17 14 the answer was, never heard of that before.

14:35:19 15 And this is somebody who had been involved in
14:35:22 16 20-plus deals to raise money for banks all over the country
14:35:27 17 at the time.

14:35:30 18 We also saw through Mr. Schechter the documents
14:35:34 19 that were created to market the capital raise, and in
14:35:38 20 particular, on this slide, there's a discussion of the
14:35:42 21 bank's commercial loan portfolio or total loan portfolio was
14:35:49 22 of 12/31/2009. This was the document that was used to
14:35:52 23 market the capital raise to investors.

14:35:54 24 And what does it say in terms of underwriting?
14:35:57 25 It says, "Strong credit culture and stringent underwriting

14:36:01 1 standards." And ask yourselves as of that period in time at
14:36:06 2 the end of January of 2010 whether that statement was
14:36:10 3 correct.

14:36:11 4 Ultimately, the bank files its Form 10-K in
14:36:17 5 February of 2010, February 22nd of 2010, and there are a
14:36:22 6 number of statements within that document that are important
14:36:25 7 to your consideration.

14:36:26 8 But first to show the relationship between the
14:36:30 9 10-K and the capital raise, the relationship between the
14:36:37 10 10-K and the capital raise, introduced into evidence was a
14:36:45 11 document filed with the SEC called a prospectus statement,
14:36:48 12 where it lists, what is the offering price going to be,
14:36:50 13 which is shown on the document as \$13.25 per share, and that
14:36:57 14 Wilmington Trust would get proceeds of \$12.62 per share out
14:37:01 15 of the public offering.

14:37:02 16 Now, the important point about the prospectus is
14:37:06 17 it incorporated everything from the Form 10-K. So the
14:37:09 18 operative document for an investor looking to invest in the
14:37:13 19 capital raise would be to go to the bank's annual report and
14:37:16 20 to read it.

14:37:19 21 So here are some of the statements that were
14:37:21 22 made in the Form 10-K filed February 22nd of 2010. To
14:37:27 23 mitigate credit risk, we employ rigorous loan underwriting
14:37:30 24 standards and apply them consistently.

14:37:34 25 Ladies and gentlemen, consider that statement

14:37:36 1 against what the defendants knew at the time about
14:37:38 2 underwriting practices at Wilmington Trust. Typically
14:37:44 3 obtain collateral and personal guarantees from commercial
14:37:47 4 borrowers. And remember all the issues from the evidence
14:37:52 5 that the bank was having from getting updated appraisals
14:37:55 6 during the time period.

14:37:56 7 Regularly review all past due loans, loans not
14:38:00 8 being repaid according to contractual terms, and loans we
14:38:04 9 doubt will be paid on a timely basis. That is the
14:38:08 10 representation to the public, somebody looking to invest in
14:38:12 11 Wilmington Trust stock in February of 2010.

14:38:14 12 What else is set forth in that document? Well,
14:38:18 13 there's a representation about collateral valuations. Our
14:38:23 14 lenders obtain updated valuations, regardless of loan size,
14:38:27 15 any time they believe there has been an obvious and material
14:38:29 16 deterioration in market conditions.

14:38:32 17 And ask yourself, ladies and gentlemen, if the
14:38:36 18 evidence has shown that that was actually what was occurring
14:38:39 19 as of February 22nd of 2010.

14:38:42 20 How do we know that the 90-day past due loan
14:38:45 21 number is important? The bank told investors that it was.
14:38:50 22 And they state in the Form 10-K, this is a document signed
14:38:56 23 by Mr. Harra, signed by Mr. Gibson, and signed by Ms.
14:39:00 24 Rakowski.

14:39:00 25 And they talk about key credit risk metrics.

14:39:03 1 The key measures we use to evaluate our exposure to credit
14:39:13 2 risk include levels of loans past due 90 days or more. And
14:39:13 3 what does the disclosure state happened to 90 past due loans
14:39:18 4 in 2009? They actually tell the public that the amount of
14:39:20 5 loans past due 90 days or more was lower at year-end 2009
14:39:25 6 than it was at year-end 2008.

14:39:30 7 Ladies and gentlemen, that is the false
14:39:33 8 statement for you to consider in terms of the second prong
14:39:37 9 of the securities fraud charge, which is Count 2. This is
14:39:44 10 the alleged materially false statement, the statement which
14:39:48 11 has been proven through the evidence to be, in fact, a false
14:39:51 12 statement.

14:39:53 13 And just in terms of the volume, I mean,
14:39:57 14 remember all the charts that we've seen so far today and
14:40:01 15 over the course of the trial. There's a representation that
14:40:03 16 the past due number is going down. Look how high the past
14:40:07 17 due number was in terms of the relevant waived loans in
14:40:12 18 2009.

14:40:14 19 Another disclosure that's relevant in the 10-K
14:40:23 20 is one relating to generally accepted accounting principles,
14:40:28 21 but specifically the past due loans. And so you will see
14:40:31 22 in the Form 10-K that there's a representation, our
14:40:34 23 critical accounting policies conform with U.S. Generally
14:40:37 24 Accepted Accounting Principles, or GAAP. In the last line
14:40:43 25 it notes, for more information about our critical accounting

14:40:46 1 policies, read note two, summary of significant accounting
14:40:49 2 policies.

14:40:51 3 So if we go to that particular page, and just as
14:40:53 4 a reminder, this is the GAAP provision at issue that Judge
14:40:57 5 Andrews has instructed you would control the policy for
14:41:02 6 reporting past due loans. And it states that the summary of
14:41:05 7 significant accounting policies shall include the policy for
14:41:13 8 determining past due or delinquent status.

14:41:17 9 And, ladies and gentlemen, take a look at this
14:41:19 10 page of the Form 10-K, Footnote 2, where the bank is
14:41:23 11 describing its significant accounting policies relating to
14:41:25 12 loans. Every reference here is to contractual.
14:41:29 13 Contractualize the loan, contractual terms of the loan
14:41:32 14 agreement, all principal and interest delinquencies become
14:41:36 15 current, contractual payments will continue.

14:41:38 16 How would anyone reading this document know
14:41:43 17 about a waiver practice? How would anyone reading this
14:41:47 18 document think that the bank was doing anything other than
14:41:52 19 reporting all loans as past due once they became
14:41:56 20 contractually past due?

14:41:58 21 And in accordance with GAAP, in the footnote
14:42:08 22 disclosed in the financial statement, the bank reported
14:42:10 23 the same 90-day past due number, \$30.06 million in accruing
14:42:19 24 past due loans.

14:42:19 25 What happened? The capital raise was a huge

14:42:21 1 success. It was what they call oversubscribed. There was
14:42:24 2 more of an interest in investors than originally the shares
14:42:28 3 that were allotted. So you'll see there that originally,
14:42:32 4 there was a certain number of shares. They added more
14:42:35 5 shares to it. Ultimately raised \$287 million total, and the
14:42:40 6 proceeds to go to the bank after all of the fees are
14:42:44 7 approximately \$273.9 million.

14:42:53 8 The standard under the scheme to defraud is if
14:42:59 9 it's a false or fraudulent statement or representation that
14:43:04 10 could deceive persons of average prudence. The evidence has
14:43:07 11 shown that no outsiders testified that they knew about the
14:43:11 12 bank's waivers or mass extensions. Jim Corkery from the
14:43:15 13 Federal Reserve. David Fomunyam from the Federal Reserve.
14:43:19 14 John Depman from KPMG. Mac Hodgson from SunTrust, and
14:43:24 15 Michael Schechter from JP Morgan. These were all
14:43:29 16 experienced professionals in the banking and accounting
14:43:32 17 industry, all whom testified and said they were unaware of
14:43:36 18 the waiver practice and they were unaware of the mass
14:43:38 19 extension of loans at year-end 2009 and the first quarter of
14:43:41 20 2010.

14:43:44 21 You heard testimony and saw evidence that the
14:43:51 22 Federal Reserve specifically requested past due loan
14:43:54 23 information, and they didn't get the waivers. And so we saw
14:43:58 24 the first day letter from the Federal Reserve, and in
14:44:05 25 connection with the first day request, there was a request

14:44:07 1 to submit a list of commercial and commercial real estate
14:44:10 2 loans 90 days or more past due which are not on a nonaccrual
14:44:14 3 basis and provide the reason why they are not considered to
14:44:17 4 be nonaccrual.

14:44:18 5 And what did the Fed get in response? And you
14:44:22 6 can see the L-6 designation at the top left. These are
14:44:25 7 loans 90 days past due. They got a list of loans that
14:44:28 8 included loans that were past due because they had matured
14:44:31 9 and were in the process of extension, and based on that
14:44:35 10 list, as you heard Mr. Fomunyam, the understanding from the
14:44:37 11 Federal Reserve was that the bank was reporting matured
14:44:40 12 loans as past due.

14:44:44 13 Mr. Fomunyam also talked about the loan
14:44:47 14 discussions and why this list was important. The Federal
14:44:51 15 Reserve examiners sat down with Mr. North and the
14:44:54 16 relationship managers and they went through each and every
14:44:57 17 single loan on the list to determine if the loan should be
14:45:00 18 reported as past due or reported as nonaccrual.

14:45:04 19 It had to be something, either past due or
14:45:07 20 nonaccrual, and you see some of the handwriting that's on
14:45:10 21 the list showing that they did engage in that process and
14:45:13 22 that the Federal Reserve would have reviewed all of the
14:45:16 23 loans if they would have been -- the evidence shows they
14:45:21 24 would have reviewed all of the loans had they been provided.

14:45:24 25 In the first day letter, there was also a

14:45:26 1 specific request as of March 31st, 2009, for all delinquent
14:45:31 2 loans. And Government Exhibit 213, the bank provided that
14:45:39 3 as well. And it's a little bit difficult to see on the
14:45:42 4 screen, but I can enlarge the last column a little bit.
14:45:46 5 You'll see that this particular document ends with the file
14:45:51 6 date column. There is no waiver column. There is no
14:45:55 7 comments column. This is the information that the Fed got
14:45:59 8 and it did not include the waived loans.

14:46:02 9 When the Federal Reserve came back for the
14:46:06 10 target examination, they requested past due loan information
14:46:09 11 as of September 30th, 2009, one of the largest periods in
14:46:14 12 which there were matured waived loans.

14:46:18 13 And what did the Fed specifically request? A
14:46:21 14 listing of all CRE loans or relationships as of
14:46:25 15 September 30, 2009 that were past due 30 days or more, and
14:46:29 16 specifically references to provide the amount of past due
14:46:33 17 principal.

14:46:35 18 What was provided in response? And this is
14:46:39 19 Exhibit 2 59. A report that had less than a page of 90-day
14:46:47 20 past due loans. There were no waived loans, and there
14:46:52 21 were no waiver columns. And this is a quarter in which
14:46:56 22 the bank waived approximately \$300 million in relevant
14:47:02 23 waived loans.

14:47:04 24 Now, Mr. Corkery and Mr. Fomunyam were -- they
14:47:09 25 were asked about this ALERT data that is sent out in advance

14:47:14 1 of commercial bank's examinations. Both Mr. Corkery and
14:47:18 2 Mr. Fomunyam testified that ALERT is used for one purpose,
14:47:21 3 and that is to create line cards. And we saw examples of
14:47:26 4 the various line cards with the handwriting of Mr. Fomunyam
14:47:29 5 and other examiners.

14:47:31 6 And in their collective years of experience,
14:47:34 7 Mr. Corkery and Mr. Fomunyam testified that they never used
14:47:37 8 the ALERT data for past due loan reporting. In fact, they
14:47:41 9 testified they never saw the ALERT data.

14:47:43 10 And why is that relevant? The Fed specifically
14:47:47 11 requested past due loan information, and so there's no
14:47:50 12 reason at that time to believe that the bank is being and
14:47:54 13 the individuals providing the information are being anything
14:47:56 14 other than truthful.

14:47:57 15 One of the things that was important about the
14:48:02 16 use of the ALERT data. If you recall, that information
14:48:07 17 could not be reconciled back to the call report. There were
14:48:11 18 82 fields of information on the ALERT data. There was one
14:48:14 19 in particular that had FRB information, where normally, if
14:48:18 20 you had information in the call report, that is something
14:48:23 21 that theoretically could have been done. Wilmington Trust
14:48:25 22 did not provide the FRB information, so there was no way to
14:48:29 23 meaningfully reconcile the information back to the call
14:48:31 24 report.

14:48:31 25 And the final point is, it's not easy to find

1 even if you are looking for it. And think back to when
2 defense counsel was sorting through all the ALERT data to
3 try to show it to Mr. Corkery that day. We took at least
4 two different breaks over technical difficulties and trying
5 to figure out which particular loan should be included in
6 the sorting sample and which one shouldn't and to figure out
7 the spreadsheet and to try to get it exactly right. That
8 took a long time to do that with a couple breaks, and that's
9 when everyone knows what to look for. Imagine how hard it
10 is to find if you have no idea what you are looking for, or
11 no reason to question the information that the bank was
12 provided.

13 You also might hear an argument that the Federal
14 Reserve was aware of past due loan reporting because of an
15 audit services report that was provided to Mr. Corkery in
16 connection with the target examination.

17 And Mr. Corkery testified that he did, in fact,
18 receive a copy of an audit services report in January 2010,
19 and he told you that he was evaluating it for form over
20 substance. And let's take a look first at the substance and
21 we'll get back to the form and look at some additional
22 documents.

23 The substance of this document refers to two
24 different spreadsheets of loans and two different lists, one
25 list that is going to have maturity dates through

14:50:03 1 January 1st of 2010, and a second list of loans that are
14:50:06 2 going to mature through April 30th of 2010.

14:50:11 3 If you recall during Mr. Corkery's testimony,
14:50:15 4 after the top document was shown to him by defense counsel,
14:50:20 5 Mr. Corkery was shown a copy of Government's Exhibit 418, a
14:50:25 6 January e-mail that all the defendants are on.

14:50:28 7 And here is the information that wasn't on the
14:50:31 8 audit services document. What was the first list? Well,
14:50:35 9 the first list was 803 matured/maturing loans totaling
14:50:41 10 \$1.3 billion.

14:50:43 11 What was the second list? 450 loans maturing
14:50:46 12 between January 1st of 2010 and April 30th of 2010 totaling
14:50:50 13 \$432 million, and also a reference at the top to decades
14:50:50 14 old problem. None of that information is on the other
14:50:50 15 documents.

14:51:00 16 That is the substance though. Let's get back to
14:51:02 17 the form. That was Mr. Corkery's testimony, that he
14:51:06 18 reviewed the document for form over substance. How do we
14:51:11 19 know that's correct? It's corroborated by the bank's own
14:51:15 20 documents.

14:51:15 21 And so you saw, and this is Government's
14:51:18 22 Exhibit 740. This is a copy of the audit services packet
14:51:21 23 with the agenda for the meeting in January of 2010. It
14:51:25 24 indicates that Ronald Pendleton was going to provide certain
14:51:29 25 information at that meeting.

14:51:33 1 In a later document, you got to see the minutes
14:51:36 2 of the meeting. This is Government's Exhibit 741-R. And
14:51:41 3 what does that state? When Mr. Pendleton is talking about
14:51:46 4 the Federal Reserve, he notes, the second recommendation
14:51:49 5 will be that audit services revise the format of its issues
14:51:53 6 priority report and not remove issues from that report until
14:51:57 7 they are completed, completely consistent with what
14:52:02 8 Mr. Corkery testified is the information in the bank's own
14:52:04 9 meeting minutes of the audit committee.

14:52:07 10 Furthermore, it notes that Mr. Pendleton
14:52:12 11 summarized the particular plan that is referred to as
14:52:15 12 detailed. It doesn't list any particular issues, and notes
14:52:20 13 that in the future, the departments issue priority report
14:52:24 14 "will be in the format the Federal Reserve recommended,"
14:52:30 15 once again, completely consistent with Mr. Corkery and what
14:52:33 16 he testified about the manner in which he was reviewing that
14:52:36 17 particular information.

14:52:40 18 The defendants also showed Mr. Corkery a later
14:52:42 19 version of the audit services report, but just for your
14:52:46 20 purposes and from the record, you can see it. It's Defense
14:52:50 21 Exhibit 441. It's a total packet of 335 pages that include
14:52:55 22 not only the audit services report, but a number of other
14:53:04 23 responses to examination findings.

14:53:04 24 And there's issue 220. But look at the date,
14:53:09 25 July 9th of 2010. This is a letter sent to the Federal

1 Reserve in the third quarter of 2010, well after the capital
2 raise and well after all of the various false statements in
3 call reports, SEC reports, and the monthly regulatory
4 reports.

5 And, ladies and gentlemen, you had a chance to
6 listen to Mr. Corkery and Mr. Fomunyam. You saw them
7 testify. You can evaluate their demeanor, evaluate their
8 credibility, but what Mr. Corkery testified to about the
9 audit services report is corroborated by the bank's own
10 documents themselves. And ask yourself if Dave Fomunyam and
11 Jim Corkery would have any hesitation of writing up the bank
12 on a particular issue if they knew about it given the manner
13 of the reports and the findings that they provided to the
14 defendant.

15 As we heard from Mr. Corkery, the bank is
16 ultimately given a troubled condition letter by the Federal
17 Reserve in August of 2010.

18 You also heard testimony that KPMG tested past
19 due loan information, and there was a particular work paper
20 that was introduced through Mr. Depman. It was work paper
21 A-60. And you'll see in the upper left-hand corner, the
22 designation PBC, which Mr. Depman testified meant "prepared
23 by client."

24 This is a copy of the bank's past due and
25 nonperforming loans report as of 12/31/2009 that was

1 provided by the bank to KPMG in order to test the accuracy
2 and completeness of past due loans.

3 And what hand as a result of that test? If you
4 recall, Mr. Corkery testified that KPMG tested 25 loans and
5 there were no exceptions noted, so KPMG performs all of the
6 sampling, all of the testing that was set forth under its
7 audit manual and the test passed.

8 And you heard about the ticking and tying and
9 how KPMG would look at particular disclosures and the
10 highlighted portion of Footnote 8 we saw earlier, what the
11 bank reported in 90-day past due loans in its SEC report,
12 \$30.6 million. That is the reference there that they
13 followed from this internal report all the way to the SEC
14 report.

15 And Mr. Depman further testified that part of
16 the test program was to get a printout from the Shaw system
17 from a bank employee, and, again, the PBC designated,
18 prepared by client. So this would have been a screen shot
19 of the Shaw system as he testified provided by a bank
20 employee to verify that the information on the past due
21 report was accurate.

22 Now, you also saw an exhibit introduced by the
23 defendants relating to a Wilmington Trust e-mail account
24 that was set up for KPMG, a general inbox, and you saw two
25 different e-mails from January of 2010.

14:56:33 1 There is the designation of the KPMG at
14:56:37 2 WilmingtonTrust.com inbox. This was a document that was not
14:56:45 3 in KPMG's work papers. As you can see from the Bates stamp,
14:56:49 4 it was provided by Wilmington Trust Corporation. This
14:56:53 5 particular office, consolidated office or statistics report,
14:57:00 6 Mr. Depman testified, never saw before, KPMG didn't test
14:57:04 7 before. And the language that was highlighted by defense
14:57:07 8 counsel was something about an adjustment due to the waived
14:57:11 9 loans in the delinquency section of the report.

14:57:14 10 Again, Mr. Depman testified he had no idea what
14:57:17 11 was a waived loan. He had frequent interaction with each of
14:57:23 12 the defendants, particularly defendants Gibson and Rakowski,
14:57:28 13 was never told about waived loans, was never told about mass
14:57:31 14 extensions. And so when you look at that e-mail, sent to
14:57:36 15 the general inbox, no meaningful description of waived
14:57:40 16 loans.

14:57:40 17 They replaced an e-mail that was sent two days
14:57:43 18 earlier to the general inbox. It was not in KPMG's work
14:57:47 19 papers. It was not sent by the defendants. And it wasn't
14:57:51 20 sent to John Depman, and certainly these four defendants
14:57:54 21 knew how to find him. And you saw that we introduced
14:57:56 22 certain e-mails that were sent by the defendants to Mr.
14:58:01 23 Depman.

14:58:01 24 Something else you might hear about relating to
14:58:04 25 KPMG is whether they were aware of maturities based on a

14:58:08 1 letter that they sent to the bank in the early part of 2010.

14:58:12 2 As Mr. Depman testified, KPMG identified a
14:58:15 3 deficiency relating to loan maturities, but what he said
14:58:21 4 was, that was from a risk rating standpoint, and they did
14:58:24 5 further testing that passed.

14:58:26 6 And so we showed certain documents, and start
14:58:30 7 with one e-mail that you might see from the defense
14:58:31 8 attorneys in their closing. And the e-mail from Jason
14:58:37 9 Delozier dated January 15, 2009, and relates to a number of
14:58:41 10 matured loans that are on the system. It is doesn't explain
14:58:47 11 whether these loans are 30 to 89 days past due, or 90 days
14:58:50 12 due, or anything. But Mr. Delozier, who Mr. Depman
14:58:52 13 testified was not involved in the past due reporting
14:58:55 14 process, writes specifically questions about whether the
14:58:57 15 loans were properly risk rated and whether or not a pass
14:59:02 16 rating would be appropriate.

14:59:04 17 And so this particular finding makes its way
14:59:07 18 into a letter that was sent to the bank in February of 2010.
14:59:14 19 And what does it say? We noted certain loans on the system
14:59:17 20 with past due maturity dates. We recommend loans past their
14:59:22 21 maturity date be reviewed by the company's credit review
14:59:25 22 section, that's Mr. Infant and Ms. Thuresson. Such loans,
14:59:31 23 if performing, should be considered for technical watch
14:59:33 24 status.

14:59:34 25 And so the issue identified by KPMG has nothing

14:59:38 1 to do with past due loan reporting. They did a separate
14:59:41 2 test for that, which passed. This relates to risk ratings.

14:59:45 3 And I mentioned a minute ago that KPMG did
14:59:48 4 further testing of the deficiency that they identified.
14:59:52 5 That's also reflected in the work papers, where Mr. Depman
14:59:57 6 testified every deficiency would be included in a chart to
15:00:01 7 see what they did with the information.

15:00:02 8 And so the description, as we noted certain
15:00:09 9 loans on the system with past due maturity dates that were
15:00:13 10 not being addressed by management. And the same document
15:00:14 11 has what the further testing was. They did what auditors
15:00:16 12 do. They selected a sample and verified that they had
15:00:19 13 extension agreements in place. No exceptions noted.

15:00:22 14 So even for that deficiency, KPMG just didn't
15:00:27 15 stop the process. They did further testing, and the
15:00:29 16 testing passed. And you heard from Mr. Depman that you
15:00:32 17 can't review every single piece of paper of a client.
15:00:35 18 You test to find if there are problems, and the past due
15:00:40 19 loan testing passed, and the matured loans that were
15:00:44 20 sampled passed as well.

15:00:45 21 Now, just as important relating to this issue is
15:00:50 22 what the defendants thought that KPMG knew. And so one of
15:00:55 23 the exhibits shown to Mr. Depman was a memo to the audit
15:00:59 24 committee that was co-authored by defendant North and
15:01:03 25 defendant Rakowski in April of 2010, in which the subject is

15:01:09 1 response to KPMG comments.

15:01:13 2 And so that document includes the specific

15:01:17 3 comment that KPMG made about loan review, about certain

15:01:21 4 loans with past due maturity dates. And look at what the

15:01:24 5 management response was to this document drafted by

15:01:27 6 defendant North and defendant Rakowski. They note that

15:01:30 7 loans of past due maturity will be considered for review by

15:01:33 8 the credit review division and placement on technical watch

15:01:37 9 status.

15:01:39 10 So if there's an argument about intent or that

15:01:42 11 the defendants thought that KPMG knew about the matured

15:01:46 12 loans issue, two of the four defendants write a memo in

15:01:50 13 which they're expressing their knowledge and intent of

15:01:52 14 what the issue is. And so this response doesn't mention

15:01:59 15 AS220. It doesn't mention the two lists, or it doesn't

15:02:04 16 mention as of April of 2010, a new way of reporting past

15:02:09 17 due loans. It's consistent with Mr. Depman's testimony that

15:02:13 18 everyone thought that this issue related to risk ratings,

15:02:16 19 and most importantly, that is what two of the defendants

15:02:18 20 thought.

15:02:19 21 Now, Mr. Depman was shown the document from

15:02:26 22 audit services which had the information about a new way of

15:02:29 23 reporting past due loans as of March 31st of 2010. He

15:02:33 24 testified that he was unaware of it and had not -- was

15:02:37 25 unaware of that particular provision within the report.

15:02:43 1 There's further corroboration for that as well,
15:02:46 2 and so there's a Defense Exhibit 706, which is the bank's
15:02:52 3 own meeting minutes of the audit committee that were
15:02:56 4 provided to KPMG, and this is the audit committee meeting
15:02:59 5 where that audit services 220 issue would have been
15:03:01 6 discussed.

15:03:02 7 And so what does it say? That Mr. Pendleton
15:03:07 8 reviewed the issues priority report, that he summarized the
15:03:13 9 specific issues coded in red in the report.

15:03:17 10 If you recall, we walked through this with Mr.
15:03:20 11 Depman. There were four red issues and they were all
15:03:24 12 Priority one audit issues.

15:03:27 13 And so going back to AS220, that was a Priority
15:03:32 14 2 issue. So according to the bank's over documents in terms
15:03:35 15 of the meeting minutes of the audit committee, this specific
15:03:39 16 issue was not discussed. It was not a red issue.

15:03:43 17 Now, what else did Mr. Depman testify about
15:03:49 18 internal audit? Another exhibit that was introduced by
15:03:52 19 defendant Gibson's counsel, it's Defendants' Exhibit 395,
15:03:56 20 and it was the KPMG audit manual relating to, among other
15:04:00 21 things, the evaluation and testing of the work of the
15:04:06 22 client's internal audit services.

15:04:08 23 And it notes in the audit manual, when we intend
15:04:15 24 to use specific work of internal auditing, we should
15:04:17 25 evaluate and perform audit procedures on that work to

15:04:21 1 confirm its adequacy for our purposes. And furthermore, we
15:04:25 2 should compare the results of our work with that done by
15:04:28 3 internal audit. The extent of this work will depend on the
15:04:32 4 circumstances and should allow for us to make an evaluation
15:04:34 5 of the overall quality and effectiveness of the internal
15:04:36 6 auditor's work being considered by us.

15:04:40 7 And so the defendants introduced another exhibit
15:04:43 8 which came from KPMG's work papers relating to how they
15:04:46 9 evaluated internal audit during the course of the 2009
15:04:51 10 audit. And it states specifically, we would not plan to use
15:04:55 11 the work of audit services except in a direct assistance
15:04:59 12 capacity. And all that meant is, they sent out letters to
15:05:04 13 clients and borrowers to confirm information.

15:05:06 14 So that's an important context for you all to
15:05:12 15 consider in terms of how KPMG considered internal audit in
15:05:15 16 connection with the 2009 examination, how KPMG used internal
15:05:20 17 audit.

15:05:20 18 Mr. Depman testified that they did not test the
15:05:23 19 audit services report and they did not substantively rely on
15:05:26 20 internal audit in any way. And that is, ladies and
15:05:31 21 gentlemen, reflected in their own work papers in an exhibit
15:05:34 22 that was introduced by the defense.

15:05:36 23 What did Mr. Depman rely on? He relied upon
15:05:40 24 representations of the defendants. And so we introduced the
15:05:46 25 management letter that would be sent to KPMG from Wilmington

15:05:51 1 Trust personnel in making certain representations, signed by
15:05:54 2 defendant Gibson and defendant Rakowski. A second
15:05:58 3 representation sent March 1st, 2010, in connection with the
15:06:02 4 capital raise, making certain representations, again, signed
15:06:06 5 by defendant Gibson and defendant Rakowski.

15:06:10 6 Mr. Depman testified he met pretty frequently
15:06:14 7 with each of the defendants. He met most frequently with
15:06:17 8 defendant Gibson and defendant Rakowski, would ask
15:06:20 9 particular questions, and we'll see in a bit some of the
15:06:23 10 specific questions that were asked on a quarterly basis.

15:06:26 11 Stock analysts like Mac Hodgson also would ask
15:06:33 12 questions about the commercial loan portfolio.

15:06:35 13 So Government's Exhibit 427 is a question from
15:06:37 14 Mr. Hodgson where he's talking about the fact that the loan
15:06:41 15 portfolio is not declining. It's an e-mail that was
15:06:45 16 addressed, among others, to Mr. Gibson, Mr. North.

15:06:50 17 And he states, "Investors assume that banks are
15:06:53 18 kicking the can down the curb and will have to realize
15:06:56 19 greater losses in future quarters." This is an outside
15:07:00 20 analyst asking specific ever questions relevant to past due
15:07:04 21 loans and loan extensions.

15:07:06 22 You also saw during Mr. Hodgson's testimony that
15:07:12 23 he asked a specific question of defendant North in the
15:07:15 24 course of the earnings call for the first quarter of 2010,
15:07:19 25 where initially there was a question about, specifically

15:07:21 1 about 90-day past due loans.

15:07:23 2 And Mr. Hodgson asked: You mentioned that the
15:07:29 3 90-day past due loans was driven by real estate construction
15:07:32 4 loans that matured, that hadn't paid off and you guys are
15:07:35 5 obviously working on extensions.

15:07:37 6 Then he asked the question: The response from
15:07:41 7 Mr. North is, the profiles of these credits aren't
15:07:44 8 necessarily credits with issues or problems when four months
15:07:46 9 earlier, there was a reference to some of these same exact
15:07:49 10 loans as credit turds. They were extended year-end 2009,
15:07:54 11 and once again, extended on the last week end in March in
15:07:59 12 2010.

15:08:03 13 And, finally, the underwriters asked specific
15:08:06 14 questions about the loan portfolio.

15:08:08 15 And you've seen now several times the business
15:08:10 16 due diligence and the certain questions that were asked
15:08:13 17 about credit underwriting guidelines, loan modification,
15:08:17 18 delinquencies, and the chart that was prepared for the
15:08:20 19 underwriters in order to market the capital raise.

15:08:27 20 Now, each of the counts of 1, 2 and 4 to 16 of
15:08:41 21 the indictment have certain elements that are common to
15:08:45 22 them, such as the defendant must act knowingly, and
15:08:50 23 depending on the offense either with an intent to defraud or
15:08:53 24 to deceive.

15:08:55 25 For certain counts, there's a requirement of

15:08:57 1 willfulness. There's also for certain counts a requirement
15:09:00 2 of materiality.

15:09:02 3 And you can review the specific instructions
15:09:06 4 provided by the Court for knowingly, willfully, intent to
15:09:12 5 defraud and intent to deceive, but one thing of importance
15:09:15 6 with respect to the willfully instruction, and that is at
15:09:21 7 the bottom, the last paragraph, last sentence. Willfulness
15:09:26 8 requires an awareness that conduct was unlawful. It does
15:09:29 9 not require proof that the actor knew of the existence and
15:09:33 10 meaning of the specific statute or regulation making his or
15:09:37 11 her conduct criminal. It's awareness in the general sense
15:09:41 12 that the conduct is unlawful.

15:09:44 13 MR. BREEN: Objection.

15:09:44 14 THE COURT: Overruled.

15:09:46 15 MR. KRAVETZ: And so ultimately, the Court's
15:09:50 16 instruction will control in that area.

15:09:53 17 Now, certain counts do not require proof of
15:09:58 18 willful conduct, and it's important that you consider
15:10:01 19 those counts under the standard that doesn't require
15:10:03 20 willfulness.

15:10:05 21 And those counts are 7 to 10, false entries in
15:10:08 22 banking records, and that is a charge that's against all the
15:10:11 23 defendants.

15:10:12 24 And Count 17 to 19, which is making false
15:10:15 25 certifications in financial reports, and that relates to

15:10:19 1 defendant Gibson.

15:10:20 2 Now, the Court also provided an instruction on
15:10:25 3 intent to defraud, which means to act knowingly and with the
15:10:30 4 intention or purpose to deceive or to cheat. In considering
15:10:33 5 whether a defendant acted with an intent to defraud, you may
15:10:36 6 consider, among other things, whether the defendant acted
15:10:38 7 with a desire or purpose to bring about some gain or benefit
15:10:42 8 to himself or herself or someone else, or with a desire or
15:10:47 9 purpose to cause loss to someone else.

15:10:51 10 And, again, when you are thinking about the
15:10:53 11 intent to defraud at issue here, certainly, the bank is
15:10:57 12 receiving a benefit by the false past due loan reporting,
15:11:02 13 and that applies to all of the call report information as
15:11:09 14 well as the securities filing in which investors invested
15:11:13 15 \$287 million in the capital raise.

15:11:17 16 Another mental state is intent to deceive, and
15:11:22 17 that relates to Counts 4 and 6 and 7 to 10. And as the
15:11:25 18 Court has instructed you, to act with an intent to deceive
15:11:29 19 means to act with intent to deceive or to cause a person to
15:11:35 20 believe that which is false. So it is a different -- again,
15:11:36 21 the Court's instruction controls, but it's a different
15:11:38 22 standard than intent to defraud. Unlike in intent to
15:11:41 23 defraud, there's no requirement to bring about a gain or for
15:11:44 24 benefit or to cause a loss. It's simply to act with an
15:11:48 25 intent to deceive, to mislead someone to believe that which

15:11:52 1 is false.

15:11:56 2 The Court also provided an instruction on
15:11:58 3 accomplice liability, and this instruction is important to
15:12:03 4 the counts relating to defendant North, who did not actually
15:12:07 5 sign the call report, the call reports, the SEC reports, or
15:12:14 6 the monthly regulatory reports. And it's also relevant to
15:12:17 7 certain counts relating to defendant Rakowski, where she did
15:12:20 8 not sign the specific document.

15:12:22 9 So as the Court has instructed you, it's a
15:12:27 10 four-part test. One or more of the principals committed the
15:12:30 11 offense.

15:12:31 12 Two, the defendant knew that the offense charged
15:12:33 13 was going to be committed or was being committed by the
15:12:37 14 principal.

15:12:38 15 Three, the defendant knowingly did some act for
15:12:41 16 the purpose of aiding, assisting, facilitating, or
15:12:52 17 encouraging the principal in committing the specific offense
15:12:55 18 charged, and with the intent that the principal commit that
15:12:58 19 specific offense.

15:12:58 20 And, four, that defendant performed an act in
15:13:01 21 furtherance of the offenses charged.

15:13:03 22 We are going to talk about Mr. North's conduct
15:13:05 23 in a minute. It's important to understand the standard as I
15:13:09 24 do so.

15:13:09 25 As I mentioned, the principals are listed as the

15:13:13 1 Wilmington Trust Corporation, defendant Harra, defendant
15:13:15 2 Gibson as to all the counts. Defendant Rakowski is a
15:13:18 3 principal as to particular counts, counts where she signed
15:13:22 4 the documents, and there's a listing of the counts where
15:13:26 5 accomplice liability applies.

15:13:29 6 Now, the Court also instructed on the standard
15:13:38 7 for materiality, and His Honor gave you two different
15:13:40 8 standards, depending on the type of document at issue.

15:13:43 9 The first is a substantial likelihood that a
15:13:45 10 reasonable investor would have viewed the information as
15:13:48 11 having significantly altered the total mix of information
15:13:51 12 available, and that relates primarily to the
15:13:55 13 securities-related offenses.

15:13:56 14 And the second is a natural tendency to
15:14:01 15 influence, or was capable of influencing the actions of the
15:14:04 16 decision-making body to which it is directed. That's
15:14:07 17 Counts 5 and then 7 to 16. Most of those counts relate to
15:14:13 18 where the false statement is made to a federal agency. It's
15:14:16 19 not relating to an investor, but the issue relates to the
15:14:22 20 governmental entity.

15:14:25 21 Now, you will have the opportunity to review a
15:14:28 22 stipulation that the parties entered into. It's marked as
15:14:31 23 Exhibit S-6. And essentially, the defendants and the
15:14:35 24 Government agreed that the amount of 90 days past due loans
15:14:40 25 was material for purposes of how His Honor instructed you on

15:14:45 1 that standard.

15:14:45 2 And in particular, I will just read from Count
15:14:51 3 1, but you'll see there's similar language for the other
15:14:53 4 counts. That the Government is required to prove with
15:15:00 5 respect to Count 1 that the quantity of loans that were past
15:15:03 6 due for 90 days or more were material. The Court will
15:15:06 7 define material and materiality in its final instructions.
15:15:10 8 The parties stipulate and agree that those statements are
15:15:13 9 material and the Government does not need to produce any
15:15:16 10 additional evidence beyond this stipulation to establish
15:15:19 11 materiality to Count 1. And you'll see that there are
15:15:24 12 similar representations to each of the counts in the
15:15:26 13 indictment.

15:15:27 14 That brings us to a discussion of the individual
15:15:36 15 defendants, and we'll start with defendant North.

15:15:41 16 Defendant North was the individual at Wilmington
15:15:47 17 Trust who approved waived loans. You heard the testimony
15:15:50 18 from Mr. Cummings that Mr. North approved the waived loans,
15:15:54 19 would do so either orally or in person or in writing via
15:15:58 20 e-mail. And it was the waiver decision and the sign-off to
15:16:02 21 Mr. North that would ultimately go to the finance
15:16:06 22 department, the controller's group, and be incorporated into
15:16:08 23 the past due and nonperforming loan report.

15:16:11 24 In terms of mental state, we talked about some
15:16:16 25 of the e-mails earlier that have bearing on Mr. North's

15:16:20 1 knowledge, intent, and willful conduct. The example of the
15:16:24 2 one from June of 2008, noting his awareness that matured
15:16:29 3 loans were something that were extremely important and that
15:16:33 4 they would have an impact on the second quarter numbers,
15:16:37 5 what was being reported publicly.

15:16:41 6 We saw Government Exhibit 445 and 446,
15:16:46 7 describing what the standard was and the ultimate goal,
15:16:49 8 which was to report a true past due number that would not
15:16:52 9 contain any matured loan.

15:16:55 10 And another e-mail from Mr. Cummings that he
15:17:01 11 sent to Mr. North, and this is Government Exhibit 448,
15:17:04 12 October of 2009, where Mr. Cummings is sending information
15:17:09 13 to Marian Fean from internal audit, and at the bottom notes,
15:17:15 14 I am choosing to intentionally not discuss the waiving of
15:17:21 15 the reporting for regulatory and financial purposes. Any
15:17:24 16 comments would be appreciated.

15:17:26 17 Mr. North made certain adjustments to the e-mail
15:17:31 18 before it went out, and that's reflected in bold, but
15:17:35 19 nothing with respect to that specific comment.

15:17:37 20 And if you recall, Mr. Cummings testified that
15:17:39 21 he sent that e-mail to Mr. North to cover himself.

15:17:45 22 Mr. North was also aware of the monthly
15:17:47 23 regulatory reports and the requirement to report past due
15:17:52 24 loans to the Fed on a monthly basis. If you recall through
15:17:55 25 the testimony of Mr. Brewer, there was a big enforcement

1 binder that Mr. North left for Mr. Brewer when he took over
2 defendant North's job functions, and contained within that
3 binder was a letter, a draft of a letter from November of
4 2009 that ultimately went to the Federal Reserve, reporting
5 out the monthly regulatory report for October of 2009.

6 We saw earlier the technical deficiencies that
7 were identified by the Federal Reserve. Mr. North was the
8 chief credit officer of the bank, and although you certainly
9 cannot consider bank policies, violation of bank policy as
10 to whether someone committed a crime or evidence of
11 violation of bank policy is not alone criminal activity, you
12 can certainly Mr. North's knowledge of the level of
13 noncompliance with bank policies when you are considering
14 his knowledge, his intent, and whether he acted willfully
15 with respect to the reporting of past due loans.

16 We also have evidence that Mr. North received a
17 copy of and provided edits to the specific disclosure
18 relating to past due loans in the SEC report, and this was a
19 document that came in through Ellen Roberts. As you can
20 see, the subject is credit risk section, and it was the
21 specific section in the Form 10-K that related to past due
22 loans. And Ms. Roberts noted that it was a pre-draft, that
23 she was including Mr. North on the distribution. And Mr.
24 North provided certain comments, and I believe you saw
25 through the evidence what those comments were.

15:19:47 1 But the important thing is, Mr. North received a
15:19:50 2 copy of the MD&A section. He was aware of the information
15:19:56 3 that was contained within the MD&A section that had the
15:19:59 4 specific disclosures relating to 90-day past due loans, and
15:20:04 5 he took the time to read it and to provide comments.

15:20:09 6 We also know that Mr. North was involved in the
15:20:11 7 business due diligence for the underwriting process, and,
15:20:15 8 once again, the specific questions that were asked during
15:20:18 9 that process.

15:20:18 10 An e-mail, Government Exhibit 543. This is the
15:20:27 11 last weekend in March of 2010, an e-mail from Mr. North to
15:20:31 12 defendant Harra and several other bank employees, talking
15:20:34 13 about the extension of 176 loans on the last weekend in
15:20:40 14 March of 2010, and he refers to what they are dealing with
15:20:44 15 as the matured loans beast and also a fire drill.

15:20:50 16 And we note from the evidence that Mr. North is
15:20:55 17 also someone who would talk to investors. Once again, the
15:20:58 18 e-mail from Mac Hodgson asking specific questions about
15:21:01 19 relevant loan information. And we previously saw the Q&A
15:21:06 20 from the transcript of the earnings call where Mr. North is
15:21:10 21 someone who is answering questions from investors during the
15:21:15 22 call at the end of the first quarter of 2010.

15:21:17 23 And the last document with respect to Mr. North
15:21:21 24 in this section. If you recall, he wrote a memo in March of
15:21:26 25 2010 that was entitled "Tomorrow's meeting," and

15:21:29 1 specifically, it was a memo relating to matured loans.

15:21:34 2 And that memorandum referenced the issues that
15:21:39 3 the bank was experiencing, continuing to experience relating
15:21:43 4 to matured loans in the first quarter of 2010. And he notes
15:21:49 5 the lack of information and the overall magnitude of the
15:21:52 6 undertaking, and states near the end of March, there is
15:21:56 7 simply no way that the lenders will be able to complete
15:22:00 8 full reviews and analyses of all of these matured/maturing
15:22:04 9 loans in Delaware commercial real estate to match the pace
15:22:07 10 of maturities over the next couple months.

15:22:12 11 And says in the end, in addition to it's
15:22:15 12 imperative that these extensions be followed up by the
15:22:18 13 full execution of any required document, I would also
15:22:21 14 suggest that we share this game plan with Jim Corkery at
15:22:25 15 the Fed. And the evidence introduced at trial is that he
15:22:29 16 never did.

15:22:29 17 And the follow-up e-mail to Mr. Harra saying,
15:22:39 18 What we don't want are the Feds seeing a skew of matured
15:22:47 19 loans on Shaw. They're never commented on the matured in
15:22:49 20 the past. I want to give them no opportunity in the future.
15:22:49 21 Again in considering the good faith of defendant North, in
15:22:52 22 considering his intent, whether he thought that the Federal
15:22:55 23 Reserve was aware of all of these issues, the e-mail is
15:22:58 24 really important. It's dated March 25th of 2010.

15:23:03 25 Next is defendant Rakowski. Defendant Rakowski

1 was the bank's controller. You've seen information and
2 documents that defendant Rakowski was proficient in
3 accounting guidance. This particular document, Government's
4 exhibit, discusses an agenda of a disclosure committee
5 meeting where Ms. Rakowski was talking about Guide 3.
6 Remember Guide 3 is the industry guide that contains the
7 specific disclosure relating to past due loans.

8 We also saw introduced through Mr. Depman that
9 Ms. Rakowski would write detailed accounting and regulatory
10 memoranda on a quarterly basis that would discuss changes in
11 GAAP or regulatory reporting or income tax reporting over
12 the quarter, and would list how the bank was going to deal
13 with those changes going further.

14 Ms. Rakowski was also the relevant person.
15 She was the main point of contact for KPMG when KPMG would
16 have requests relating to how accounting policies were
17 applied at Wilmington Trust.

18 And you saw two examples of these inquiry
19 documents that Mr. Depman testified there were specific
20 questions that would be asked of Ms. Rakowski and/or
21 Mr. Gibson every quarter, such as whether there are any
22 new accounting policies, any new or changes to non-GAAP
23 policies, any changes in accounting policy, all information
24 that Ms. Rakowski was inquired of by KPMG during the
25 relevant time period. And the testimony was that she never

15:24:53 1 disclosed the waiver practice or any of the iterations in
15:24:56 2 the policy of the waiver practice or the fact that there
15:25:01 3 were extensions.

15:25:02 4 Ms. Rakowski was aware of the findings of the
15:25:06 5 Federal Reserve in September of 2009. If you recall, one of
15:25:10 6 the documents in her desk file was a letter dated
15:25:14 7 September 26th of 2009 that had some of the same specific
15:25:19 8 findings that were contained in the exam report relating to
15:25:24 9 use of interest reserves and extensions, working capital
15:25:27 10 lines of credit. And that's the same information that we
15:25:32 11 saw earlier that was in Government's Exhibit 221-R.

15:25:37 12 In addition, Ms. Rakowski was aware of the
15:25:42 13 requirement for the bank to report matured loans on a
15:25:47 14 monthly basis to the Fed after the 2009 examination.

15:25:53 15 If you recall, there's a really important
15:25:55 16 e-mail, Government Exhibit 524, and you're going to have a
15:25:59 17 chance to see the actual version of the document. This is
15:26:02 18 the document that came from, was introduced through the
15:26:05 19 records custodian of the bank. It came in through, it was
15:26:09 20 represented that it came in through Ms. Rakowski's desk
15:26:11 21 files, and there was the handwriting at the top of the
15:26:14 22 document.

15:26:15 23 This is the document displayed on the screen.
15:26:18 24 And it starts with a question sent by Mico Slijepcevic,
15:26:23 25 where it states specifically, the regulators have asked

15:26:26 1 that we provide the past due report to them on a monthly
15:26:29 2 basis.

15:26:30 3 And near the bottom it states, Kevyn Rakowski
15:26:37 4 has asked if you could break down the waivers that were made
15:26:39 5 in September by category for the 30 to 89 and the over 90
15:26:43 6 bucket separately. The two waiver categories she is asking
15:26:45 7 for are dollar amount of waivers related to matured loans,
15:26:49 8 dollar amount of waivers for other reasons.

15:26:57 9 So there's no question that the individual at
15:26:58 10 the bank responsible for accounting policies is the bank's
15:27:01 11 controller, is aware at the end of September of 2009 that
15:27:04 12 the bank is engaged in a waiver practice relating to matured
15:27:09 13 loans.

15:27:10 14 And what's is the response? The response is
15:27:15 15 effectively that there are \$338 million worth of waived
15:27:20 16 loans in that category in the third quarter of 2009.

15:27:26 17 And that particular e-mail is so important that
15:27:29 18 it's printed out from Ms. Rakowski's Outlook inbox. You can
15:27:35 19 see Kevyn N. Rakowski in the upper left, signifying exactly
15:27:41 20 that it was actually printed out. It was retained in Ms.
15:27:45 21 Rakowski's desk file, and the handwriting on top
15:27:48 22 specifically relates to the following. "Regulators asked
15:27:51 23 for past due in call report. That is everything." And
15:27:55 24 there's emphasis on the word "past due." It's underlined.

15:28:04 25 In addition, Ms. Rakowski is on Government

15:28:07 1 Exhibit 418, where there is the discussion of the mass
15:28:11 2 extensions and the fact that loans that were extended at
15:28:14 3 year-end 2009 did not have the proper needed level of
15:28:21 4 underwriting required, that they weren't supported by
15:28:25 5 thorough analysis in underwriting.

15:28:30 6 And Ms. Rakowski was aware at year-end 2009 that
15:28:35 7 there were significant problems with the bank's commercial
15:28:37 8 real estate and construction portfolio. This is an e-mail
15:28:40 9 from defendant Gibson to Ms. Rakowski dated Monday,
15:28:44 10 December 28th, 2009, where it's referring to the poor
15:28:48 11 results for the loan portfolio for this quarter, and the
15:28:51 12 fact that Mr. Gibson wanted to initiate a very deep dive
15:28:56 13 into the details and performance characteristics of the
15:29:00 14 CRE/construction book.

15:29:01 15 And he writes further, we have a credibility
15:29:04 16 GAAP if we can't provide a better picture of the portfolio
15:29:07 17 given the large provision we expect in the rise in NPAs, or
15:29:13 18 nonperforming assets. So, again, information, relevant
15:29:18 19 information that Ms. Rakowski has relating to that specific
15:29:21 20 segment of the loan portfolio at year-end 2009.

15:29:24 21 And Ms. Rakowski is also aware of information
15:29:28 22 coming out of the surge process, and the fact that in the
15:29:32 23 first month of January alone, there's a reduction of
15:29:36 24 \$446 million in loans that had been rated pass.

15:29:42 25 There's evidence that Ms. Rakowski was involved

15:29:45 1 in meetings relating to the capital raise, and that Ms.
15:29:53 2 Rakowski received copies of the MD&A credit risk section,
15:29:57 3 the specific section of the Form 10-K that contained the
15:30:01 4 90-day past due loan information.

15:30:02 5 Ms. Rakowski signed the Form 10-K in her
15:30:09 6 position as senior vice president and controller, and she
15:30:14 7 wasn't surprised by the different findings from internal
15:30:18 8 audit relating to that audit services 220 issue.

15:30:22 9 Ms. Rakowski receives a copy of the document,
15:30:24 10 forwards it to Mr. Gibson and says, don't think that this is
15:30:27 11 a surprise, but did not see either of you on the
15:30:30 12 distribution list.

15:30:32 13 And for the amount of time that defense counsel
15:30:36 14 spent on audit services issue 220 in this particular case,
15:30:40 15 look at the individual at the bank who is responsible for
15:30:44 16 AS220 from finance. It's not Marty McDonough, it's not
15:30:50 17 Mico Slijepcevic. It's one person and it's Kevyn Rakowski,
15:30:53 18 the controller, and that's the bank's own documents.

15:30:57 19 Your Honor, I see I'm at 3:30, if it's time for
15:31:00 20 a break.

15:31:00 21 THE COURT: All right. Thank you, Mr. Kravetz.
15:31:03 22 Ladies and gentlemen, we'll take an afternoon
15:31:06 23 break for 15 minutes until quarter of four.

15:31:08 24 (The jury was excused for a short recess.)

15:31:43 25 THE COURT: All right. Everyone may be seated.

15:31:44 1 Mr. Kravetz, what's your estimate now?

15:31:48 2 MR. KRAVETZ: I run through the last two

15:31:49 3 defendants, then talk about conspiracy, then that's the end,

15:31:52 4 Your Honor.

15:31:52 5 THE COURT: All right. So that's not very

15:31:54 6 helpful.

15:31:54 7 MR. KRAVETZ: I realize that.

15:31:56 8 THE COURT: Okay. Well, so, Mr. --

15:32:00 9 MR. KELLY: What did you say?

15:32:02 10 MR. KRAVETZ: I said I realize it's not helpful.

15:32:06 11 MR. DALTON: I didn't hear it. I'm sorry.

15:32:08 12 MR. KRAVETZ: I think it's likely 4:30.

15:32:09 13 THE COURT: Okay. So, Mr. Kelly, the jury has

15:32:13 14 indicated that they really can't stay past 5:00, so I'm

15:32:18 15 perfectly happy if you want to just adjourn for the day when

15:32:21 16 Mr. Kravetz is finished, or -- I'm happy to do whatever you

15:32:25 17 want, but if you start talking and you are not finished at

15:32:29 18 5:00, we're going to break and continue again tomorrow

15:32:31 19 morning. And if you want to think about that, you can tell

15:32:35 20 me in ten minutes, that would be fine, too.

15:32:37 21 MR. KELLY: That would be great, Your Honor.

15:32:38 22 Let me think about it.

15:32:40 23 THE COURT: Okay.

15:32:45 24 (Short recess taken.)

15:36:15 25 - - -

15:36:15 1 (Proceedings resumed after the short recess.)

15:45:55 2 THE COURT: Mr. Foley?

15:46:01 3 MR. FOLEY: Your Honor, piggybacking off of

15:46:05 4 Mr. Breen's objection, we're asking for a curative

15:46:07 5 instruction regarding the -- when the Government was talking

15:46:12 6 about willfully, they added in that it simply requires that

15:46:17 7 the defendant have a general sense of wrongdoing, and in the

15:46:22 8 prayer discussion, that phrase was discussed, it was

15:46:26 9 removed, but the jury then heard it anyway.

15:46:29 10 THE COURT: Well, I removed it because I didn't

15:46:32 11 think it was necessary. I didn't think it was wrong. It's

15:46:36 12 a Court of Appeals opinion.

15:46:37 13 MR. FOLEY: Well, it dilutes the standard

15:46:39 14 because it does, we think, require that they knew that the

15:46:42 15 conduct was unlawful, and when you give this sort of just

15:46:44 16 general sense of wrongdoing, it's diluting it.

15:46:47 17 So I think it was a misstatement. It was taken

15:46:49 18 out of the instruction during the prayer conference, and I

15:46:53 19 think it's a pretty critical remark.

15:46:55 20 THE COURT: Well, I'm not going to do anything

15:46:57 21 right now. I will get the transcript and see what the

15:47:00 22 context was, but the fact that it's said in a general sense

15:47:08 23 by itself to me gets you nowhere, and if it was said with

15:47:14 24 wrong words around it, that would be something else.

15:47:17 25 MR. NOWAK: In addition, Your Honor, was

15:47:18 1 displayed for the jury was what was a purported jury
15:47:21 2 instruction concerning the statement of half-truths. As you
15:47:26 3 might recall --

15:47:27 4 THE COURT: No. That I recall perfectly well,
15:47:29 5 Mr. Nowak. You are right. And I took it that there was a
15:47:33 6 prepared slide. Mr. Kravetz didn't say anything about it.
15:47:36 7 It was not up there very long. No juror could possibly have
15:47:40 8 said, hey, wait a second, there are four extra words there,
15:47:42 9 so I propose to do nothing about it.

15:47:46 10 There's nothing I can do about it that would,
15:47:49 11 like, help you.

15:47:50 12 MR. NOWAK: Okay.

15:47:50 13 THE COURT: Right?

15:47:51 14 MR. NOWAK: We may do something about it in our
15:47:54 15 closing.

15:47:54 16 THE COURT: Well, if you choose, you choose, but
15:47:56 17 I mean, you are perfectly right.

15:47:58 18 And I don't think -- Mr. Kravetz, I take it you
15:48:01 19 just had that prepared.

15:48:03 20 MR. KRAVETZ: I didn't read that and talk
15:48:04 21 specifically about the other prong of Count 2.

15:48:07 22 THE COURT: No, and I know you didn't read it,
15:48:10 23 and you did read -- it had two bullet points on the same
15:48:14 24 slide, so, yes. Just an unfortunate thing, but nothing that
15:48:22 25 makes an a material impact on anything.

15:48:24 1 **But if you want to bring it up in your closing**
15:48:26 2 **to say it's not concealment, yes, sure, go ahead, or**
15:48:29 3 **something.**

15:48:30 4 **MR. NOWAK: It's not in the instructions.**

15:48:32 5 **THE COURT: It's not in the instructions, right.**

15:48:34 6 **MR. NOWAK: What you are shown by the Government**
15:48:36 7 **is not one of the instructions.**

15:48:37 8 **THE COURT: I'm sorry. What?**

15:48:39 9 **MR. NOWAK: What you are shown by the Government**
15:48:41 10 **is not one of the instructions.**

15:48:42 11 **THE COURT: All right.**

15:48:44 12 **MR. NOWAK: I'm not -- I'm just considering it.**

15:48:47 13 **THE COURT: All right. Well, why don't you just**
15:48:49 14 **let me know what you are planning on doing. But, you know,**
15:48:52 15 **it was shown to them.**

15:48:53 16 **MR. KRAVETZ: Your Honor, page 52, you**
15:48:54 17 **instructed the jury, in addition, deceitful statements of**
15:48:58 18 **half-truths for the expression of opinion may constitute**
15:49:01 19 **false --**

15:49:01 20 **THE COURT: Right. But you had the words**
15:49:04 21 **concealment of something or other.**

15:49:06 22 **MR. NOWAK: Material fact.**

15:49:08 23 **THE COURT: Four words that I took out.**

15:49:09 24 **MR. KRAVETZ: Oh.**

15:49:10 25 **THE COURT: I mean, I think you corrected it,**

15:49:17 1 even though I took it out until just now, but it was taken
15:49:21 2 out.

15:49:21 3 MR. NOWAK: Additionally, the instruction is
15:49:23 4 knowledge of the statute giving rise to criminal conduct
15:49:25 5 does not need to be shown. It doesn't say anything about
15:49:28 6 regulation, knowledge as a regulation.

15:49:30 7 THE COURT: I'm sorry, Mr. Nowak. I'm not sure
15:49:33 8 what you are talking about now.

15:49:34 9 MR. NOWAK: Okay.

15:49:35 10 MR. FOLEY: I know, Your Honor. That was under
15:49:37 11 willfully, is the Government correctly read the sentence
15:49:41 12 that says, willfully does not require proof that the actor
15:49:44 13 knew of the existence and meaning of the statute of making
15:49:48 14 his or her conduct criminal. That's Third Circuit. But
15:49:52 15 what the Government did, they said statute or regulation.
15:49:54 16 They threw that in there, and that's a misstatement of the
15:49:59 17 law. That takes it another whole step.

15:50:01 18 MR. NOWAK: That's contrary to the other
15:50:02 19 instruction you gave the jury about violations of
15:50:05 20 regulation, not --

15:50:06 21 THE COURT: I'm not going to do anything right
15:50:09 22 now. What I heard did not offend me, so to speak. I will
15:50:15 23 get a transcript tonight and look at it. We can deal with
15:50:19 24 it tomorrow morning.

15:50:20 25 I'm not going to do anything right now. Based

15:50:22 1 on what seemed to me just listening to it, would be fine. I
15:50:27 2 do appreciate maybe I didn't catch everything.

15:50:29 3 MR. FOLEY: Thank you, Your Honor.

15:50:31 4 MR. NOWAK: Thank you.

15:50:32 5 THE COURT: Are we ready to proceed? Mr. Kelly?

15:50:34 6 MR. KELLY: Depending on when Mr. Kravetz

15:50:35 7 finishes, I personally do the no mind starting and then

15:50:38 8 finishing, if that's okay with Your Honor.

15:50:40 9 THE COURT: It's okay with me.

15:50:41 10 MR. KELLY: All right.

15:50:42 11 THE COURT: I want to do whatever you want to

15:50:44 12 do. You can make a game time decision.

15:50:49 13 MR. KELLY: Thank you, Your Honor.

15:50:50 14 THE COURT: All right. Go ahead. Let's get the
15:50:53 15 jury.

15:50:53 16 (The jury entered the courtroom.)

15:52:50 17 THE COURT: All right, members of the jury.

15:52:51 18 Welcome back. Everyone, you may be seated.

15:52:53 19 Mr. Kravetz, you may proceed.

15:52:55 20 MR. KRAVETZ: Thank you. Good afternoon again.

15:52:56 21 Let's talk next about defendant Gibson.

15:53:02 22 Defendant Gibson was the CFO at Wilmington Trust. He served

15:53:08 23 Wilmington Trust for more than 20 years, was the CFO, named

15:53:13 24 the CFO in 1996.

15:53:15 25 Mr. Gibson had degrees from two of the top

1 universities in the country, the University of Delaware, and
2 an MBNA in finance and accounting from Vanderbilt. The
3 evidence shows that Mr. Gibson was a very experienced banker
4 and CFO.

5 Now, the evidence has also shown that Mr. Gibson
6 was aware of all of the findings that were presented by the
7 Federal Reserve. Mr. Gibson was in the exit meeting, the
8 2009 full scope examination, the 2010 target examination,
9 and was aware of what was happening in connection with the
10 2010 full scope examination. So all of the findings from
11 the Federal Reserve we looked at this morning, that was all
12 information that was shared with Mr. Gibson.

13 Mr. Gibson was also the principal person at
14 Wilmington Trust who signed the call reports, and in
15 particular, an attestation on the call report that states,
16 I, the undersigned CFO of the named bank, attest that the
17 reports of the condition and income, including the
18 supporting schedules, Schedule RC-N, for this report date
19 have been prepared in conformance with the instructions
20 issued by the appropriate federal regulatory authority and
21 are true to the best of my knowledge and belief.

22 And you've seen the evidence relating to
23 schedule RC-N in the reporting instructions, and His Honor
24 instructed you as to what those reporting requirements
25 mean.

15:54:43 1 In addition, Mr. Gibson signed the Form 10-K.
15:54:47 2 He also signed a number of other certifications, including a
15:54:51 3 certification relating to management's report on internal
15:54:54 4 controls over financial reporting, a document or a piece of
15:54:58 5 the Form 10-K also signed by Mr. Harra.

15:55:02 6 Mr. Gibson also signed the Section 1350
15:55:06 7 certification, and we'll see the specifics of that in a few
15:55:13 8 moments.

15:55:14 9 And there was an additional Rule 13(a)
15:55:19 10 certification signed by Mr. Gibson in connection with the
15:55:22 11 10-K, and it states, and I quote, "Based on my knowledge,
15:55:26 12 this report does not contain any untrue statement of a
15:55:29 13 material fact or omit to state a material fact necessary to
15:55:33 14 make the statements made in light of the circumstances under
15:55:36 15 which such statements were made, not misleading with respect
15:55:40 16 to the period covered by the report." And that's the period
15:55:44 17 of 2009.

15:55:45 18 In addition, Mr. Gibson is aware not only of the
15:55:50 19 waiver practice, but the magnitude of waived loans. This is
15:55:54 20 an e-mail dated November 16th, 2009. It was sent by
15:55:58 21 defendant Rakowski to defendant Gibson, contained the
15:56:01 22 attachment for the October 31st, 2009, delinquency report,
15:56:07 23 the report that was approved by Mr. North. And that portion
15:56:10 24 of the e-mail states, we did pull the waived loans from the
15:56:13 25 past due report.

15:56:16 1 So not only does Mr. Gibson have the attachment
15:56:20 2 forwarded to him which has all the information contained
15:56:23 3 therein, but the controller, the person who works directly
15:56:26 4 for him, is telling him, we did pull the waived loans.
15:56:29 5 They are not included in what we are reporting to the
15:56:32 6 public.

15:56:32 7 Mr. Gibson also spoke on behalf of the bank, and
15:56:40 8 not only did he speak on behalf of the bank, he made certain
15:56:42 9 statements relating to past due loans.

15:56:45 10 This is an important exhibit, Government
15:56:47 11 Exhibit 544, and it goes to Mr. Gibson's knowledge of
15:56:51 12 whether matured loans are past due.

15:56:54 13 And so you see at the bottom of the document,
15:56:56 14 it's an e-mail from Mr. Gibson to Mr. North and Ms. Towe on
15:57:01 15 July 7th of 2010. The subject is matured loan affecting
15:57:04 16 delinquency and Fed pledged loans.

15:57:07 17 Mr. Gibson writes: What does approved but not
15:57:11 18 documented mean? Don't we document the approval? Clearly
15:57:14 19 just matured and current does not cut it.

15:57:17 20 And so Mr. North responds. I mean that we've
15:57:20 21 approved it internally, in the normal channel, but any
15:57:25 22 needed loan documentation has not been drafted and executed.

15:57:28 23 And what is Mr. Gibson's response? Those are
15:57:32 24 past due. We need those loans where we have executed
15:57:36 25 agreements.

15:57:37 1 It gets back to some of the concepts that we
15:57:40 2 talked about this morning, the falsity of the past due loan
15:57:42 3 reporting, and the fact that everyone within the bank, at
15:57:46 4 least the four defendants, were aware that documents were
15:57:49 5 required, executed documents in order to validate, extend
15:57:55 6 loans.

15:57:56 7 I mention that Mr. Gibson spoke on behalf of the
15:57:58 8 bank as the CFO. He would spoke in roadshows. He would
15:58:03 9 spoke during the course of earnings calls. This is an
15:58:06 10 earnings call as of July 23rd of 2010, where the bank is
15:58:10 11 reporting its results for the second quarter of 2010.

15:58:14 12 Mr. Gibson is asked a very specific question:
15:58:17 13 Could you provide some color on why you determined that the
15:58:20 14 90-day delinquency loans should not go into nonaccrual
15:58:23 15 status because, again, it has to be one or the other. It's
15:58:27 16 either past due or nonaccrual.

15:58:29 17 And the answer to Mr. Gibson is, there was a
15:58:32 18 group of loans that for a variety of reasons, the renewal
15:58:35 19 process is taking longer than expected. They are current on
15:58:39 20 interest, but technically, because they have matured, they
15:58:42 21 are past due their principal.

15:58:45 22 And he notes, as a technical matter, a matured
15:58:50 23 loan is past due principal. That's the understanding of the
15:58:54 24 Chief Financial Officer of Wilmington Trust in terms of when
15:58:58 25 loans should be reported as past due. None of this matured,

15:59:02 1 in process of extension. It's past due unless you have the
15:59:06 2 documents executed.

15:59:09 3 And imagine, ladies and gentlemen, if this
15:59:11 4 standard was applied in the third quarter or fourth quarter
15:59:14 5 of 2009, or the first quarter of 2010, when we saw the
15:59:18 6 volume of waived loans, the relevant waived loans that
15:59:21 7 weren't matured, and ask yourselves how the numbers would
15:59:25 8 have looked if Wilmington Trust would have reported past due
15:59:28 9 loans, as Mr. Gibson described in the 2010 second quarter
15:59:34 10 earnings call.

15:59:35 11 There is evidence, and we've seen certain
15:59:38 12 documents and e-mails, and Mr. Gibson received a copy of the
15:59:42 13 credit risk section of the MD&A for the Form 10-K. Here is
15:59:47 14 an exhibit that was introduced through Ellen Roberts in the
15:59:52 15 second quarter of 2010, where Mr. Gibson is suggesting
15:59:55 16 deleting the paragraph on the increase in past due 90-day
15:59:59 17 loans, and notes that the amount nearly tripled, which could
16:00:05 18 be viewed as a leading indicator. Shouldn't we address
16:00:07 19 this?

16:00:07 20 We saw in the Form 10-K, the bank tells the
16:00:09 21 public, the defendants who signed the report tell the public
16:00:12 22 the 90-day past due loan information is one of their most
16:00:17 23 important metrics, and here there is a suggestion to remove
16:00:19 24 that metric, to not address the increase in the 90-day past
16:00:23 25 due loan information.

16:00:24 1 Mr. Gibson also met with Mr. Depman frequently.
16:00:28 2 He was the CFO. Mr. Depman would have been his counterpart
16:00:32 3 as the lead audit engagement partner. Just like with Ms.
16:00:35 4 Rakowski, there were certain inquiries that were made with
16:00:38 5 Mr. Gibson, and here is a specific inquiry that was made of
16:00:43 6 both Ms. Rakowski and Mr. Gibson.

16:00:47 7 And the request is, there's a question: Are
16:00:49 8 there any new estimates or significant changes to existing
16:00:52 9 estimates made during the interim period, which would be the
16:00:54 10 second quarter of 2010? If so, how have such estimates been
16:00:58 11 reported in the interim financial information?

16:01:00 12 And you'll see there, there is a reference to
16:01:05 13 deterioration in credit quality reflected in risk ratings
16:01:10 14 downgrade and increases in loans delinquent 90 plus days.

16:01:13 15 So there's a response to Mr. Depman about 90-day
16:01:18 16 past due loans in the context of risk ratings, but there's
16:01:23 17 no indication that this is a new way that the bank's
16:01:26 18 reporting for past due loans or that they had reported that
16:01:29 19 way in prior quarters.

16:01:29 20 Defendant Harra. Defendant Harra is the
16:01:36 21 president of Wilmington Trust Corporation. According to the
16:01:41 22 bio, and this is from Government's Exhibit 435, joined the
16:01:45 23 company in 1971, held many key positions. Notes that he has
16:01:52 24 specialized in all aspects of commercial and personal
16:01:54 25 financial services.

16:01:55 1 Mr. Harra had been the President and Chief
16:01:58 2 Operating Officer of the bank since 1996, so 13 or 14 years
16:02:04 3 at the time of the charged conduct. And it notes that in
16:02:07 4 addition to his responsibilities as President and COO,
16:02:12 5 "Mr. Harra also oversees all banking activities for the
16:02:16 6 company."

16:02:19 7 And the testimony from the witnesses was, during
16:02:21 8 the period 2009, Mr. Harra was the individual in charge of
16:02:24 9 regional banking, was Mr. Bailey's supervisor, Mr. Conway's
16:02:29 10 supervisor, and the direct supervisor of the leaders of the
16:02:32 11 expansion market.

16:02:35 12 Mr. Harra, like Mr. Gibson, was also present at
16:02:39 13 all of the exit meetings for the Federal Reserve
16:02:41 14 examinations, the full scope examination, the target
16:02:44 15 examination, and also was there in 2010, when the Fed came
16:02:49 16 back for the full scope examination.

16:02:50 17 And there was a reference to Mr. Harra not being
16:02:56 18 a numbers guy. Once again, Mr. Harra is president and in
16:03:01 19 charge of banking for a bank that has \$9.2 billion in loans.
16:03:08 20 He's in charge of regional banking. People report directly
16:03:10 21 to him who are the leaders of the bank relating to the
16:03:14 22 banking.

16:03:14 23 And, ladies and gentlemen, you can't have it
16:03:16 24 both ways. You can't have the position and then make the
16:03:19 25 argument, well, he didn't have the responsibility that went

16:03:23 1 with that position. This is an \$11 billion bank, a \$9
16:03:28 2 billion loan portfolio, \$50 billion in assets under
16:03:31 3 management.

16:03:31 4 Mr. Harra is the president and the COO. So
16:03:34 5 consider that when you hear the argument, or if you hear the
16:03:37 6 argument from counsel that Mr. Harra was not a numbers guy.
16:03:41 7 Mr. Harra signed the MOU. He was certainly aware of its
16:03:45 8 terms. We've talked about the specific terms in paragraph
16:03:47 9 15, and there's Mr. Harra's signature along with the other
16:03:50 10 members of the Board of Directors.

16:03:52 11 There's certainly evidence in the record that
16:03:54 12 Mr. Harra was concerned about delinquencies. The e-mail
16:03:58 13 from September of 2009, where Mr. Harra receives a copy of
16:04:02 14 the August 2009 past due report. He forwards it to his
16:04:07 15 direct report, Mr. Bailey, who is in charge of the Delaware
16:04:10 16 bank. He writes, Brian, delinquencies are headed in the
16:04:14 17 wrong direction. Before you head out today, I hope you can
16:04:16 18 fire up the troops to work on this in view of the pending
16:04:20 19 quarter end.

16:04:21 20 It's important to him. He is the president of
16:04:23 21 the bank. The numbers are going to matter to the market and
16:04:26 22 he's telling his direct report to do something about it.

16:04:29 23 We heard from Mr. Conway that Mr. Harra would
16:04:35 24 share the Mid-Atlantic market meeting, and this is the
16:04:38 25 banking meeting where all of the top personnel, Mr. Conway

16:04:41 1 and Mr. Bailey would be present, and they would talk about
16:04:45 2 issues facing the bank.

16:04:46 3 And this is the agenda from December 9th --

16:04:50 4 December 8th of 2009, where Mr. Gibson also made a cameo
16:04:54 5 appearance and talked about capital generation and the
16:04:57 6 general economic view as of year-end 2009.

16:05:01 7 But look at what was specifically discussed at
16:05:04 8 that meeting. Commercial real estate concentration.

16:05:08 9 Everyone is talking about what is happening with CRE at the
16:05:11 10 time. And specifically, matured/maturing loans and past due
16:05:16 11 loans. So all the leaders within the banking function are
16:05:20 12 talking about this issue during a period of time when the
16:05:24 13 bank is engaged in short-term extensions on a mass scale,
16:05:29 14 and also the loan approval process discussed by Mr. North
16:05:32 15 and Mr. Brewer.

16:05:33 16 Like the other defendants, there's evidence that
16:05:38 17 Mr. Harra received a copy of the draft of the MD&A section,
16:05:44 18 the credit risk section. And this e-mail noted: Dave, left
16:05:47 19 a few comments on your chair early this morning on the paper
16:05:50 20 copy. RVAH.

16:05:53 21 If you recall, Ellen Roberts introduced the
16:05:56 22 actual exhibit that have the initials RVAH 2/8, so this is a
16:06:02 23 version of the document, one of the drafts that contained
16:06:07 24 the past due loan information, the rigorous loan
16:06:09 25 underwriting information, the appraisal information that you

16:06:11 1 saw earlier today.

16:06:13 2 Mr. Harra, as we saw earlier, would sign the
16:06:17 3 certification relating to management's report on internal
16:06:20 4 controls over financial reporting. He also signed the Form
16:06:26 5 10-K as president, COO, and the director of the bank. In
16:06:31 6 addition, Mr. Harra signed the call report, and there's a
16:06:34 7 similar attestation that Mr. Gibson made where, by his
16:06:38 8 signature, Mr. Harra declared that the reports of condition
16:06:41 9 and income have been examined by us, and to the best of our
16:06:44 10 knowledge and belief, have been prepared in conformance with
16:06:49 11 the instructions issued by the appropriate federal
16:06:51 12 regulatory authority and are true and correct, and the
16:06:54 13 evidence has shown that it was not.

16:06:59 14 Mr. Harra was also aware of the additional
16:07:05 15 short-term extensions of a bunch of loans on the last
16:07:08 16 week end in March of 2010. And so, in this particular
16:07:12 17 e-mail, Government's Exhibit 543, there is a reference to
16:07:15 18 people coming in and pulling documents on Friday evening
16:07:19 19 and Saturday to get change in terms agreements for 176
16:07:25 20 deals.

16:07:26 21 So think about that. The date of this e-mail is
16:07:29 22 Sunday, March 28th. All of these people are at the bank.
16:07:33 23 They are pulling documents together. It is, in fact, what
16:07:35 24 Mr. North described it as a fire drill, trying to get all of
16:07:40 25 this information pulled together to extend 176 different

16:07:45 1 lending relationships.

16:07:46 2 And that is information that Mr. Harra is aware
16:07:49 3 of. You've seen the matured loan beast e-mail before and
16:07:52 4 the reference to the fire drill from Mr. North. That is an
16:07:56 5 e-mail that goes to Mr. Harra, and then he makes a response
16:07:59 6 thanking the people that came in over the weekend to extend
16:08:04 7 all of those loans.

16:08:04 8 Now, the timing on this is important, because as
16:08:09 9 Mr. Corkery testified, defendant Harra met with the Federal
16:08:11 10 Reserve two days later in Philadelphia and did not mention
16:08:15 11 the second mass extension push let alone the first.

16:08:19 12 He also met in the exit meeting for the target
16:08:26 13 exam on April 6th, so less than a week after all of the
16:08:30 14 loans were extended. Mr. Harra is there, Mr. Gibson is
16:08:33 15 there, meeting with Mr. Corkery and the other examiners and,
16:08:38 16 once again, neither defendant Harra nor defendant Gibson
16:08:41 17 mentions the mass extensions at that meeting either.

16:08:43 18 There are three counts that relate only to
16:08:50 19 defendant Gibson, and that's making false certifications in
16:08:53 20 financial reports. And the Court has provided the
16:08:56 21 instructions in your packet. But as we roll through them,
16:09:01 22 the first is that defendant Gibson was the CFO at Wilmington
16:09:04 23 Trust. There has certainly been evidence introduced into
16:09:08 24 the record about Mr. Gibson's position, and you have seen
16:09:11 25 that reference in documents.

16:09:12 1 The second is that Wilmington Trust Corporation
16:09:14 2 was an issuer of securities regulated by the Securities
16:09:18 3 Exchange Act. And you'll see in your packet of
16:09:20 4 instructions, the Court instructed you as a matter of
16:09:22 5 law relating to Wilmington Trust being an issuer of
16:09:27 6 securities.

16:09:27 7 The third is that Mr. Gibson certified that the
16:09:31 8 information complied with certain securities requirements,
16:09:35 9 and that "fairly presented in all material respects the
16:09:39 10 financial condition, the results of operations of Wilmington
16:09:45 11 Trust Corporation." You'll see in parentheses references to
16:09:47 12 the certifications introduced into evidence, which are
16:09:51 13 Government's Exhibit 1-A, 4-A, 5-A, and Defense
16:09:55 14 Exhibit 4006.

16:09:57 15 The next is that the certification was
16:10:00 16 materially false.

16:10:03 17 And the final is that the defendant knew at the
16:10:05 18 time that the certification was materially false.

16:10:08 19 And with respect to that last element, I would
16:10:10 20 just ask that you take a look at the stipulation marked S-6,
16:10:14 21 which has a specific stipulation relating to the materiality
16:10:18 22 of a false statement.

16:10:20 23 The Section 1350 certifications, this is 1-A,
16:10:27 24 which I just mentioned. This is essentially the charge that
16:10:31 25 Mr. Gibson made a certification that was false and complied

16:10:34 1 with the elements, as the Court read them to you, but the
16:10:38 2 certification here is that what Mr. Gibson is signing fully
16:10:44 3 complied with all of the relevant requirements of the
16:10:47 4 securities and Exchange Act.

16:10:50 5 And this is Defendants' Exhibit 4006, which is
16:10:55 6 the document that I showed a few minutes ago, where
16:11:00 7 Mr. Gibson made certain certifications. And you'll see in
16:11:03 8 paragraph 4 that there's a specific reference to Exchange
16:11:06 9 Act Rules 13-A, and 13-A and 15-D.

16:11:12 10 What didn't the reports fairly present? They
16:11:15 11 did not fairly present accurate 90-day past due loan
16:11:20 12 information.

16:11:21 13 Now, you might hear from counsel for Mr. Gibson
16:11:26 14 a lot of talk about certifications or sub-certifications or
16:11:30 15 sub-sub-certifications or sub-sub-sub-certifications. All
16:11:35 16 of the evidence shows that Mr. Gibson knew the information
16:11:39 17 was false. He didn't need a sub-certification or a
16:11:42 18 sub-sub-certification from another employee to rely upon,
16:11:46 19 something that he could wash his hands of information that
16:11:48 20 he knew about.

16:11:49 21 So ask yourselves, ladies and gentlemen, if that
16:11:51 22 argument is presented to you about sub-certifications and
16:11:54 23 sub-sub-certifications, what did Mr. Mr. Gibson know at the
16:11:59 24 time that he signed these documents? What statements did he
16:12:02 25 make about past due loans and matured loans and when loans

1 **were supposed to be reported, and evaluate that against the**
16:12:08 2 **arguments of down relating to certifications and**
16:12:11 3 **sub-certifications.**

16:12:12 4 **The last area to talk about today is conspiracy.**
16:12:20 5 **And, again, the Court's instructions are going to control,**
16:12:23 6 **but essentially, conspiracy is an agreement between two or**
16:12:27 7 **more people to knowingly defraud the United States or commit**
16:12:31 8 **a specific offense against the United States, and one overt**
16:12:34 9 **act in furtherance.**

16:12:35 10 **And the Court read in a number of overt acts**
16:12:39 11 **that are listed in your jury charge, and those are the**
16:12:42 12 **specific acts, and the only acts that you can consider**
16:12:45 13 **relating to the conspiracy.**

16:12:48 14 **So what is the conspiracy here? It's as simple**
16:12:52 15 **as this. It's an agreement to keep the reported past due**
16:12:55 16 **number down.**

16:12:57 17 **And as the Court instructed you, the Government**
16:13:03 18 **does not have to prove a formal agreement, that all of the**
16:13:07 19 **defendants agreed. As you'll see in the instruction, it**
16:13:11 20 **requires two or more participants. That it was a good plan,**
16:13:14 21 **or that it was a secret.**

16:13:15 22 **You heard a lot of talk in opening statements**
16:13:19 23 **about a requirement that a conspiracy be a secret. What the**
16:13:23 24 **Court instructs you at the end of the day, that is what**
16:13:26 25 **controls.**

16:13:27 1 **Evidence of a conspiracy can be from reasonable**
16:13:30 2 **inferences from actions and statements. And the Court also**
16:13:34 3 **I instructed you that evidence of related facts or**
16:13:36 4 **circumstances can be considered, and in terms of whether**
16:13:40 5 **there's a preconceived agreement, scheme, or understanding.**

16:13:43 6 **And, finally, joining the conspiracy. The**
16:13:48 7 **Government need not prove that the defendant you are**
16:13:50 8 **considering knew everything about the agreement, about the**
16:13:54 9 **conspiracy, or that he or she knew everyone involved in it,**
16:13:58 10 **or that he or she was a member from the beginning.**

16:14:01 11 **The Government also does not have to prove that**
16:14:03 12 **the defendant played a major or substantial role in the**
16:14:06 13 **conspiracy.**

16:14:08 14 Now, I talked a few slides ago that the
16:14:12 15 **conspiracy was to keep, it was an agreement to keep the**
16:14:17 16 **reported past due number down. That's the common scheme or**
16:14:20 17 **plan that you have to consider, the concealment of the**
16:14:25 18 **bank's true 90-day number, the true past due number from**
16:14:29 19 **regulators and investors outside the bank.**

16:14:33 20 And here the evidence has shown that each of the
16:14:36 21 defendants possessed common knowledge about mounting
16:14:40 22 maturity issues at the bank, the bad economy and its impact
16:14:43 23 on getting loans extended, and internal problems with the
16:14:47 24 bank's practices and risk management.

16:14:50 25 All of the defendants were aware of the new

16:14:53 1 monthly reporting requirements to report past due loan
16:14:56 2 information under the MOU, and the heightened scrutiny that
16:15:00 3 the Federal Reserve was going to apply given the results of
16:15:05 4 the 2009 examination.

16:15:06 5 And by October and November of 2009, there is
16:15:12 6 evidence that each of the defendants was aware that
16:15:14 7 something had to be done about it, and you've seen exhibits,
16:15:18 8 and you've heard testimony that all four of the defendants
16:15:21 9 were doing, undertaking certain activity relating to
16:15:24 10 matured past due loans beginning in September and October
16:15:28 11 of 2009.

16:15:29 12 Each of the defendants had an important role to
16:15:33 13 play in the process. That they were from different areas of
16:15:37 14 the bank is really of no consequence, or the fact that they
16:15:42 15 might not have had continual contact. They were the
16:15:46 16 decision-makers relating to past due loans. What they knew,
16:15:50 17 what they did with the information, all four of the
16:15:52 18 defendants were essential to keeping the reported past due
16:15:58 19 number down.

16:15:59 20 Mr. North was responsible for the initial
16:16:03 21 waivers. Ms. Rakowski and controller's group was
16:16:07 22 responsible for the past due and nonperforming loan report.
16:16:10 23 Mr. Gibson and Mr. Harra signed the call report, attesting
16:16:14 24 that the information was true and correct to their best of
16:16:17 25 their knowledge and belief. Ms. Rakowski, Mr. Gibson and

16:16:22 1 Mr. Harra signed the Form 10-K.

16:16:24 2 Somehow the evidence has shown that all four
16:16:26 3 defendants are aware that the information is going to be
16:16:28 4 reported publicly. All four defendants are aware of the
16:16:33 5 magnitude of waived loans and the problems relating to
16:16:37 6 extending loans at the end of the fourth quarter of 2009,
16:16:43 7 and without each of the defendants, this doesn't happen.

16:16:46 8 If Mr. North doesn't approve the waivers, the
16:16:50 9 loans don't get waived. If the controller's group doesn't
16:16:53 10 approve the past due nonperforming loan report, the
16:16:56 11 information isn't submitted publicly. If defendants Harra,
16:16:59 12 Gibson or Rakowski don't sign the documents, the information
16:17:03 13 is not transmitted.

16:17:05 14 So by their knowledge, by their conduct, and by
16:17:10 15 their action, you can infer that the defendants were part of
16:17:13 16 an agreement to keep the reported past due number down.
16:17:18 17 Certainly, Mr. Gibson, Ms. Rakowski had more direct
16:17:21 18 interaction with each other. Mr. North had more direct
16:17:25 19 interaction with Mr. Harra, that there are common meetings,
16:17:28 20 common e-mails, common other documents where they come
16:17:31 21 together. And, again, each of the four is a decision-maker
16:17:34 22 in the process and this doesn't happen without them.

16:17:37 23 I want to end with the conspiracy to defraud the
16:17:46 24 Federal Reserve and talk a little bit about the one false
16:17:50 25 monthly regulatory report that was submitted to the Fed in

16:17:54 1 November of 2009. It related to past due loan information
16:17:58 2 from October of 2009.

16:18:01 3 Now, the Court has given a specific instruction
16:18:05 4 that controls relating to defrauding the United States, and
16:18:11 5 the instruction indicates that to defraud the United States
16:18:13 6 means to obstruct or interfere with one of the United
16:18:17 7 States' Government's lawful functions, by deceit, craft,
16:18:21 8 trickery, or dishonest means.

16:18:23 9 And so here, the action of defrauding the United
16:18:26 10 States relates to providing false past due loan information
16:18:29 11 to the Federal Reserve in connection with call reports,
16:18:35 12 monthly regulatory reports and in advance of the target
16:18:39 13 examination.

16:18:39 14 The evidence has shown beyond a reasonable doubt
16:18:41 15 that the October monthly regulatory report was false. We
16:18:45 16 have seen this now several times, the requirement to report
16:18:49 17 past due loan information within 20 days at the end of the
16:18:52 18 month.

16:18:53 19 Remember just a level set on timing. The MOU
16:18:57 20 comes out October 21st of 2009. Five days later, Mr. Harra
16:19:02 21 writes the e-mail relating to matured loans being critical
16:19:05 22 issues and overemphasizing the importance of the company.

16:19:09 23 The evidence didn't -- the evidence doesn't show
16:19:11 24 that Mr. Harra just decided to get up and do this one day.
16:19:15 25 This is five days after the MOU. The bank is being forced

16:19:19 1 to do this. This is the information that's being pushed out
16:19:22 2 to all of the chief lending officers at the bank. This is
16:19:26 3 what's now required by the Federal Reserve who is asking for
16:19:29 4 information on a monthly basis.

16:19:32 5 And so we saw the e-mail from Ms. Rakowski, and
16:19:36 6 the date of that e-mail is October 28th of 2009, two days
16:19:40 7 after the Harra e-mail goes out to the lenders. Once again,
16:19:45 8 the unity of purpose, where everyone is now dealing with a
16:19:48 9 new mandate that comes down from the Fed. Where Ms.
16:19:51 10 Rakowski learns specifically about waived loans, Mr. North
16:19:55 11 knew the volume beforehand, the evidence has shown, but he's
16:19:58 12 on this e-mail as well, and this is the e-mail that again,
16:20:00 13 you want to take a look at. It's the desk file,
16:20:04 14 Exhibit 524, that has handwriting on it relating to past due
16:20:07 15 and call reports.

16:20:09 16 The first MOU submission, and this is
16:20:14 17 Government's Exhibit 247, was the September 2009 past due
16:20:20 18 report, and it was sent to the Federal Reserve on
16:20:23 19 October 30th of 2009, where essentially, the document is
16:20:30 20 showing \$17 million in commercial loans. This is the
16:20:33 21 information that is going to the Fed in the very first
16:20:40 22 report after the Fed mandates the MOU.

16:20:42 23 And as we saw in the slide before, that
16:20:44 24 information was false. It did not include the waived loans.
16:20:50 25 And you can see the significant difference when the number

16:20:52 1 jumps. There it's 369 million. When you exclude certain
16:20:58 2 information, it's around 296 million.

16:21:01 3 So the very first report that goes to the Fed
16:21:04 4 after the very critical examination process in the MOU is
16:21:09 5 false.

16:21:10 6 Fast-forward to the next month, November 16th of
16:21:13 7 2009, where Steve Cummings does what he always did, sends a
16:21:18 8 final delinquency report to the controller's group after it
16:21:20 9 was approved by Mr. North. He says, attached is the final
16:21:24 10 list. That report goes to Ms. Rakowski from Faye Loh, and
16:21:31 11 says, Kevyn, attached is the report from Steve. Loans with
16:21:34 12 "Y" in the waived column is not included in our final
16:21:38 13 numbers.

16:21:39 14 Ms. Rakowski forwards that information to
16:21:44 15 Mr. Gibson, and you can see it actually contains the
16:21:48 16 spreadsheet with the Excel label, xlsx for October 31st of
16:21:54 17 2009. And she says, we did pull the waived loans from the
16:21:57 18 past due report, and references in the next-to-the-last
16:22:03 19 sentence, and this is an important statement, "Have not had
16:22:05 20 time to look at this or go back and do a comparative.
16:22:10 21 Numbers for October still seem to be higher than I would
16:22:13 22 have expected."

16:22:15 23 And that word "comparative" becomes important
16:22:17 24 when you evaluate what was actually sent to the Fed in
16:22:20 25 connection with the monthly regulatory report.

16:22:24 1 So on November 25th of 2009, a letter goes to
16:22:27 2 the Fed, and it contains the October past due and
16:22:30 3 nonperforming loan report. And there's a particular
16:22:32 4 paragraph in that letter that relates to how Wilmington
16:22:36 5 Trust is reporting past due loans. And ask yourselves,
16:22:39 6 ladies and gentlemen, based on all of the evidence and all
16:22:41 7 the testimony that you've heard in this case whether that
16:22:44 8 information is truthful or not.

16:22:46 9 It notes that you -- you will note in the
16:22:49 10 October 2009 past due and nonperforming loan report a rise
16:22:54 11 in the past due balances for October when compared to the
16:22:56 12 past due balances for September, the end of a calendar
16:22:59 13 quarter. This rise in past due balances for months other
16:23:02 14 than the end of a calendar quarter are not unusual, as we
16:23:05 15 have historically ensured that loan payments are collected
16:23:08 16 quarterly.

16:23:08 17 I have also enclosed calendar quarter end past
16:23:12 18 due and nonperforming loan reports for the past five
16:23:15 19 quarters. A comparison of these quarter-end reports better
16:23:19 20 reflects the payment history and capacity of our borrowers.
16:23:24 21 We have recently implemented changes in our billing and
16:23:26 22 collection practices so that in 2010 we expect to see more
16:23:29 23 normalized monthly balances and trends for past dues in
16:23:34 24 these reports.

16:23:34 25 This is the information that's going to the Fed.

16:23:38 1 Remember, none of the information contains any waived
16:23:41 2 matured loans, and the representation is, we're going to
16:23:45 3 compare what is in October to what comes from other months,
16:23:49 4 and you are going to see in a moment, the other months
16:23:51 5 didn't contain waived loans either.

16:23:53 6 And what is the representation here? That the

16:23:56 7 bank is changing its billing and collection practices.

16:24:00 8 Well, what's happening on November 25th of 2009? They are

16:24:05 9 starting to go through the mass extension practice.

16:24:07 10 So there's no reference in this letter to

16:24:09 11 anything having to do with the waiver practice or a mass

16:24:13 12 extension practice. It's attributing a rise in past due

16:24:16 13 loans in October to billing and collection issues.

16:24:20 14 Here is what was reported. So as you can see,

16:24:24 15 the report, November 20th, 2009, if you remember from the

16:24:28 16 MOU, it had to be submitted, or printed out 20 days at the

16:24:32 17 end of the quarter. And there's certain loan information

16:24:35 18 reported as of October 31st of 2009.

16:24:40 19 As Mr. Hart testified, that that amount equaled

16:24:46 20 64.4 million in the relevant commercial loans, but look at

16:24:50 21 what wasn't included, \$300.1 million. These were loans

16:24:56 22 that, you know, they weren't excluded because of billing or

16:24:59 23 collection issues. These are matured loans. November 25th

16:25:03 24 of 2009, a time that everyone realizes there's a big

16:25:08 25 problem, that matured loans are overwhelming, and this is

16:25:11 1 the information that's provided to the Federal Reserve, and
16:25:13 2 that relates to Counts 10 and 16 of the indictment.

16:25:16 3 Now, that comparison that we saw, if you're able
16:25:22 4 to take a look at Government's Exhibit 243, which is the
16:25:27 5 actual report, you can see that someone from Wilmington
16:25:30 6 Trust prints out the past due report for September of 2008
16:25:33 7 on November 20th, for December of 2008 on November 24th,
16:25:40 8 June of '08 on November 2009, and September of 2009 on
16:25:46 9 November of 2009.

16:25:49 10 So three of the four reports are printed out the
16:25:51 11 same day as the October monthly regulatory report and all of
16:25:55 12 this is sent to the Federal Reserve to be part of the
16:25:58 13 comparison. None of this information, ladies and gentlemen,
16:26:02 14 none of the prior reports contain any waived loan data.

16:26:09 15 And earlier you saw that that letter, the
16:26:13 16 November 25th, 2009 letter that went to the Federal Reserve,
16:26:16 17 Mr. North had an earlier copy of the letter in his
16:26:19 18 enforcement binder that was ultimately provided to
16:26:23 19 Mr. Brewer.

16:26:24 20 The other monthly submissions were also false.
16:26:29 21 So in the large packet, Government Exhibit 247, it is like
16:26:35 22 200-plus pages of past due information submitted under the
16:26:39 23 MOU. Here is the version submitted December 31st of 2009.
16:26:44 24 It reports about \$7.8 million of past due loans. If you
16:26:49 25 recall, the actual number from the charts was close to 300

1 million that was waived. March of 2010, \$20.5 million
2 reported. A little bit over \$31 million in waived.

3 So the relevant monthly regulatory reports
4 during the conspiracy period that are important to the
5 Federal Reserve at the time period, they're all false.

6 We've also seen that waived loans were not
7 included in the target examination and you saw this exhibit
8 before. This is L-3. This is the first day request that
9 the Fed made in connection with the target exam. If you
10 recall, this is September of 2009, not even a page full of
11 over 90-day loans and none of the waivers.

12 And, finally, consider this in mind when, or
13 when or if any of defense counsel makes an argument about
14 the Federal Reserve knowing about the waiver practice.

15 Once again, this is the memorandum that is sent out by Mr.
16 North to Mr. Harra. Mr. Gibson was present at the meeting
17 where matured loans were being discussed, and Mr. North
18 notes, I would also suggest that we share this game plan
19 with Jim Corkery at the Fed, and the evidence has shown that
20 that did not happen.

21 Last legal point. There's an instruction
22 relating to responsibility for offenses committed by
23 co-conspirators. It's under the heading Pinkerton. It's
24 important that, ladies and gentlemen, that you review that
25 specific instruction, which is going to control, but it

16:28:30 1 talks about liability for substantive offenses, so we have
16:28:34 2 the conspiracy offense, which is Count 1.

16:28:37 3 The remainder of the offenses are called
16:28:39 4 substantive offenses. And so for each of those offenses,
16:28:42 5 the Court has given you specific instructions that if you
16:28:45 6 find that a defendant was a member of the conspiracy and
16:28:49 7 that the acts of the other was reasonably foreseeable to him
16:28:52 8 or her, that they can also be responsible for the underlying
16:28:56 9 offenses, so we would ask that you carefully consider that
16:29:00 10 instruction in discharging your responsibilities.

16:29:04 11 So I think there's only one thing that probably
16:29:13 12 all of us agree upon, and that's just to thank you for your
16:29:17 13 service. This has been a tremendous undertaking, a
16:29:19 14 tremendous public service that you've performed over the
16:29:22 15 last seven to eight weeks, and you certainly have some more
16:29:25 16 work to do.

16:29:26 17 You are going to hear from counsel for each of
16:29:29 18 the defendants and then you'll hear at the end of the case
16:29:33 19 one last time from Mr. McCall. And at the end of
16:29:36 20 everything, we're going to ask that you return the only
16:29:38 21 verdict consistent with the evidence, and that's a verdict
16:29:40 22 of guilty as against all the defendants as to each of the
16:29:43 23 charges.

16:29:44 24 Thank you for your time.

16:29:45 25 THE COURT: Thank you, Mr. Kravetz.

16:29:50 1 All right. So, members of the jury, I believe
16:29:57 2 that Mr. Kelly is going to start on Mr. Harra's behalf,
16:30:01 3 though we know we're going to finish at 5:00 today, and the
16:30:09 4 expectation is not that Mr. Kelly will finish in a
16:30:13 5 half-an-hour, so he will continue tomorrow morning.

16:30:15 6 Right?

16:30:16 7 MR. KELLY: Yes, Your Honor. I'm not going to
16:30:21 8 keep the jury past 5:00 o'clock. I will try to get as much
16:30:23 9 as I can and finish up tomorrow if that's okay with Your
16:30:26 10 Honor.

16:30:31 11 May I proceed, Your Honor?

16:30:32 12 THE COURT: Yes.

16:30:32 13 MR. KELLY: Mike Kelly. I represent Bob Harra,
16:30:37 14 and I join Mr. Kravetz's thanks. I know it has been a long
16:30:42 15 time, and on behalf of Mr. Harra and my team, thank you so
16:30:45 16 much. It's how the system works and we need people like you
16:30:49 17 to put in the time.

16:30:50 18 We didn't put in a -- the defense hasn't put in
16:30:57 19 a long case for one reason, and Judge Andrews, His Honor
16:31:02 20 explained to you, the Government, the Government alone has
16:31:06 21 the burden of proof here, and they have to prove a lot of
16:31:10 22 things for each element, but one of the most important is
16:31:14 23 they have to prove beyond a reasonable doubt that each of
16:31:17 24 the defendants, in my case, Bob Harra, had what they call
16:31:22 25 criminal intent, that he knew what he was doing was wrong

16:31:30 1 and he said, I'm going to do it anyway.

16:31:31 2 And I didn't hear anything in the five weeks of
16:31:37 3 the Government testimony. I heard about concern and the
16:31:41 4 numbers were rising and the Great Recession, but I didn't
16:31:44 5 hear anything about -- and I didn't hear anything just now
16:31:48 6 about, hey, don't do this. It's wrong. Don't do this.

16:31:53 7 It's the wrong way to report. This is not the way to do it.
16:31:58 8 In fact, I didn't hear any evidence that Mr. Harra even knew
16:32:05 9 what the regulations are. In fact, the only evidence that
16:32:09 10 came in was Mr. Depman.

16:32:11 11 Remember I asked him, is Bob Harra the kind of
16:32:14 12 guy that knows regulations? And he chuckled and he laughed.
16:32:18 13 And I want to spend some time on that, but I'm also going to
16:32:21 14 spend some time on evidence, and not just documents.

16:32:28 15 I frankly was waiting all along after five weeks
16:32:35 16 of testimony. It's like the person who is telling you -- I
16:32:40 17 don't know if you had this experience, telling you a long
16:32:42 18 story. I get this with my kids. When are you going to get
16:32:45 19 to the point, dad, or a joke, when is the punchline? When
16:32:49 20 is the punchline? I kept waiting and waiting. All right.
16:32:52 21 You know, they say it's wrong, they say this is the right
16:32:56 22 number, but where is the evidence that somebody else says,
16:33:00 23 this is the wrong way to report? They were reporting these
16:33:04 24 loans the same way for 28 years, 28 years, and you saw the
16:33:13 25 e-mails, and I will get to them probably tomorrow.

16:33:15 1 Everybody knows about it and they're disclosing it. They
16:33:19 2 are not hiding it. You know, 72 people.

16:33:22 3 I want to talk about what was disclosed in
16:33:24 4 writing to KPMG. I want to talk about what was disclosed in
16:33:28 5 writing to the Fed. And I kept waiting for it. My
16:33:33 6 goodness, where is the evidence, any of it, that these four
16:33:40 7 and my client, Bob Harra, said, oh, my gosh. I know this is
16:33:44 8 not the right way to report this. Oh, my goodness. You
16:33:49 9 didn't hear it.

16:33:51 10 And all this testimony from 22 witnesses, let me
16:33:56 11 read to you testimony. Again, we heard a lot about, and,
16:34:02 12 you know, I was waiting for the punchline. How long were we
16:34:05 13 here? Risk rating, supplemental financing, ten percent rule
16:34:11 14 and all of these things. And remember when I said in the
16:34:14 15 opening, this case centers around the reporting of matured
16:34:18 16 loans that were current for interest in the process of
16:34:22 17 extension. I kept waiting to say, what does all of this
16:34:26 18 stuff have to do with that?

16:34:27 19 This case centers around the allegation that
16:34:31 20 this man right here intentionally concealed from the
16:34:37 21 Government, concealed from the Government how they were
16:34:41 22 reporting these loans as if some point, after 28 years, you
16:34:45 23 know, he woke up and said, you know what, I'm going to --
16:34:50 24 you know, they've been doing it for 28 years, as long as
16:34:53 25 I've been here. I'm going to commit a crime and I know what

16:34:56 1 I'm doing is wrong.

16:34:57 2 Come on. Let me read you the testimony and
16:35:02 3 paraphrase. This is Mr. Corkery. The case centers around
16:35:07 4 concealing this reporting of matured loans, and everybody
16:35:13 5 calls it the waiver practice. Okay. Supposed to say the
16:35:16 6 waiver practice.

16:35:16 7 And Mr. Corkery was told that the matured loans
16:35:20 8 were not considered to be past due, interest was current,
16:35:24 9 and progress was being made toward renew and extension?

16:35:29 10 And he said yes.

16:35:29 11 And this document was given by the bank to the
16:35:31 12 Fed during the 2010 full scope exam, was it not?

16:35:36 13 Yes.

16:35:37 14 These are the federal work papers?

16:35:40 15 Correct.

16:35:41 16 And they are the federal work papers.

16:35:45 17 "This document describes the bank's waiver
16:35:47 18 practice, doesn't it, Mr. Corkery?

16:35:50 19 "Answer: It doesn't say waiver, but, yes.

16:35:55 20 "Question: It doesn't talk about the bank's
16:35:57 21 treatment of its matured loans though, does it?

16:36:02 22 "Answer: It does.

16:36:04 23 "Question: This document describes the bank's
16:36:07 24 waiver practice, doesn't it, Mr. Corkery?

16:36:11 25 "Answer: Yes."

16:36:13 1 Conceal the waiver practice? When this guy -- I
16:36:19 2 didn't hear much about testimony here. Mr. Kravetz is a
16:36:22 3 great lawyer, he's a good man. This team, they're good
16:36:25 4 people, they are doing their job, but the stakes are high
16:36:27 5 here, and concealing the waiver practice from the Fed when
16:36:33 6 this guy under oath says it wasn't concealed? I submit to
16:36:39 7 you the case should be over on that alone, on that alone.

16:36:43 8 Criminal intent?

16:36:47 9 Now, let me display to you a document. I don't
16:36:57 10 know if you can read this. This is the issue. They yelled
16:37:01 11 at me for turning around during my opening. Look, I've got
16:37:05 12 a screen here. I'm going to look at it. Can you see it?

16:37:07 13 All right. And this is April 13th, 2010. Look
16:37:13 14 at the lower right. Federal Reserve, BP. That's from the
16:37:20 15 Federal Reserve files. Look at the top. Issue 220.
16:37:25 16 Properly process and account matured loans. Short-term
16:37:30 17 extensions approved. Comprehensive portfolio review
16:37:34 18 progressing.

16:37:35 19 And look. In the past, the level of matured
16:37:39 20 loans was problematic. However, these matured loans were
16:37:42 21 not considered to be past due if interest was current and
16:37:44 22 progress was being made towards renewal/extension.

16:37:48 23 All right. This was disclosed to the Feds. I
16:37:56 24 just read you the testimony. Here's the documentation here.
16:38:00 25 Disclosed in writing, in writing.

16:38:05 1 Conceal the waiver practice? Their burden of
16:38:12 2 proof. We have no burden of proof, none. As you heard His
16:38:18 3 Honor say, we don't have to come up with any evidence,
16:38:22 4 nothing. It's all their burden of proof, and they're saying
16:38:26 5 it's conceal the waiver practice.

16:38:30 6 You know, I was looking at all of these things
16:38:35 7 that, this other stuff that I said I kept waiting for the
16:38:39 8 punchline, and, you know, the risk rating, interest
16:38:44 9 reserves, the appraisals. Right. And in closing, I can
16:38:49 10 come up with an analogy; right? And because I played
16:38:55 11 football and boxed all my life, I'm going to try to avoid
16:38:59 12 all of those.

16:39:00 13 But how about a shotgun? Let's hear about all
16:39:02 14 of this stuff. Let's hear about how bad the bank was.
16:39:06 15 Let's hear about the risk rating, the supplemental
16:39:09 16 financing. And how long did we talk about that stuff? That
16:39:11 17 was most of the testimony, concealing the waiver practice
16:39:17 18 and the intent to conceal the waiver practice.

16:39:23 19 And how much of the stuff was about the bank?
16:39:28 20 Right? We're talking about these four people right here.
16:39:32 21 You know, the bank did this, the bank did that. How much
16:39:35 22 did we hear that Bob Harra, said, oh, I know this is wrong
16:39:40 23 and I'm going to do it anyway. You didn't hear anything
16:39:42 24 about that. How is that? You didn't hear anything about
16:39:45 25 that.

16:39:46 1 You didn't hear anything that he ever thought
16:39:48 2 that anything he was doing was illegal. You didn't hear
16:39:51 3 anything about anything he thought he was doing and
16:39:55 4 following along 28 years was a crime.

16:39:59 5 All right. Risk rating, supplemental financing.
16:40:04 6 Bob is not charged with any crime of having bad appraisals,
16:40:11 7 abusing the ten percent rule. By the way, the bank changed
16:40:14 8 that rule, changed that rule in 2008, and Joe Terranova
16:40:19 9 stopped it in the fall of 2009. Supplemental financing.
16:40:24 10 The bank changed that rule in April of 2009.

16:40:27 11 And where is the evidence that Bob abused the
16:40:30 12 ten percent rule, abused the interest reserve, that Bob
16:40:34 13 abused supplemental financing? Guess who did abuse? Take a
16:40:38 14 wild guess. Joe Terranova and Brian Bailey.

16:40:42 15 And what did the bank do? What did the bank do
16:40:46 16 with them? Oh, they fired them. They fired them.

16:40:52 17 So this document, you know, the Feds have it in
16:40:56 18 their possession. There is the number, and look at the
16:41:01 19 date. It's all there. It's all there.

16:41:07 20 Now, let me just say something, because I am
16:41:14 21 going to be back tomorrow and hopefully not too long. But,
16:41:21 22 Your Honor, may I leave the podium?

16:41:23 23 This man is not a liar. This man did not
16:41:30 24 defraud the Government. This man -- the evidence has not
16:41:33 25 shown that this man has done any of that. The evidence has

16:41:40 1 shown to the contrary. That he's an honest man, that he's a
16:41:46 2 truthful man. And I ask you, look, I didn't keep them on
16:41:52 3 very long, but the Government put his truthfulness and
16:41:54 4 honesty at issue, and I ask you, and I ask you to think
16:41:58 5 about this. Would the Reverend take an oath in this
16:42:04 6 courtroom and lie about what he thought about Bob Harra's
16:42:08 7 truthfulness? And I ask you, would Brother Ronald come in
16:42:11 8 here and take an oath, and when you say, what's the
16:42:15 9 truthfulness and honesty on a 1 to 10? He said 13. Think
16:42:19 10 about that. Think about that. Think about what evidence
16:42:22 11 the Government came up with will to show this guy would lie
16:42:30 12 to anybody.

16:42:33 13 This guy would lie to the Government? Worked
16:42:38 14 his way up in the bank, trainee. This guy is going to lie
16:42:45 15 to the Government? Risk everything he worked for? Risk his
16:42:51 16 family's name? Do you really think beyond a reasonable
16:42:59 17 doubt?

16:43:00 18 The Government called 22 witnesses, 22. Not one
16:43:09 19 of them, not one of them that was asked -- not all were
16:43:13 20 asked, but not one that was asked said Bob told them to lie
16:43:18 21 to the Government. This is a fraud case. This is a conceal
16:43:23 22 from the Government case.

16:43:25 23 Did any of them say Bob told them to conceal
16:43:29 24 anything? Not one. In fact, they said to the contrary.
16:43:34 25 Mr. Brewer said, Mr. Harra never asked him to conceal

16:43:37 1 anything from the auditors, regulators, anyone else.

16:43:40 2 Mr. Conway, he started the same day. Remember
16:43:44 3 they started 40 years. They worked alongside. Said never
16:43:48 4 asked him to conceal or lie to the Government, and he said
16:43:52 5 never. And I agree with my friend, Mr. Kravetz. You do
16:43:55 6 look at how the witness presents himself or herself
16:43:59 7 remember when we asked him, did he ever do that? Never,
16:44:03 8 never.

16:44:05 9 And the list goes on. Their witnesses,
16:44:09 10 Mr. Infanti, Toshia Styles, Ellen Roberts, Mitch Slijepcevic.
16:44:18 11 All I remember he gives the Mitchapalooza. That's all I
16:44:22 12 remember, but I don't know if I pronounced his name right.
16:44:26 13 Barbara Marley. John Depman. Even John Depman, KPMG.
16:44:33 14 Steve Cummings. None of these people. They all said that
16:44:39 15 neither Bob nor anybody else told them to lie about what
16:44:45 16 was in the report, all of these people in the Wilmington
16:44:52 17 Trust.

16:44:52 18 I will talk to you tomorrow about the burden of
16:44:54 19 proof, beyond a reasonable doubt. Beyond a reasonable doubt
16:44:56 20 means you can't speculate. If there are holes in their
16:45:01 21 case, you can't say, I'm going to fill in those holes, I'm
16:45:05 22 going to speculate. And you heard His Honor say, if it's a
16:45:09 23 possible doubt, that's not enough. All of these people,
16:45:13 24 where is the evidence this guy lied or tried to conceal
16:45:20 25 something from the Government?

16:45:21 1 Just because they say it's wrong doesn't mean
16:45:24 2 it's wrong. 28 years. All of these people. They've got
16:45:31 3 accountants, they've got lawyers. They've got other people
16:45:35 4 onsite in the bank. They've got KPMG looking at this,
16:45:40 5 certifying. Right?

16:45:44 6 I will get to Mr. Depman. Remember he was the
16:45:46 7 guy that couldn't even -- remember I said, how about a
16:45:48 8 ballpark of what you make, how much they paid you? Oh, I
16:45:52 9 don't even know. Come on. Can you estimate? No. Remember
16:45:55 10 it was \$2 million a year?

16:45:56 11 Now, these guys come in, they say they don't
16:45:59 12 know and they're there since 2001. Thirteen, fifteen,
16:46:04 13 whatever the people was onsite and they're certifying, and
16:46:09 14 they say they don't know? I will show you later how they
16:46:12 15 know in writing.

16:46:17 16 You know, I mentioned the witnesses and I will
16:46:21 17 get to those in a second. But wouldn't you think in this
16:46:26 18 case where they are charging my client with 15 felonies,
16:46:30 19 that they would come up with one document that says, hey,
16:46:34 20 Bob, you know, this is the wrong way to report these loans.
16:46:41 21 Did you see that? No, ma'am. No, sir.

16:46:45 22 Was there concern about the rising number of
16:46:48 23 matured loans? Yes. Was there concern about a lot of
16:46:53 24 rising numbers during the Great Recession? Yes. Sure,
16:46:58 25 there was concern.

16:47:01 1 And what is the evidence? Remember Mr. Brewer,
16:47:03 2 Mr. Conway said, we had a problem. We're trying to do our
16:47:07 3 best to get around and come forward with a plan. There was
16:47:12 4 concern, but where is the evidence that, aha, that's the
16:47:16 5 wrong way to do it. Let's change it.

16:47:21 6 Where is the evidence that somebody said, hey,
16:47:24 7 Bob, this is the regulations that say this and it's wrong.
16:47:30 8 I know he doesn't have to be aware of the regulations.

16:47:34 9 Mr. Kravetz, remember, he pointed to the TFR and
16:47:37 10 he said, there's no evidence that anybody saw that. Well,
16:47:41 11 guess what? What he didn't tell you was, there's no
16:47:44 12 evidence that Mr. Harra or these other three saw the RC-N
16:47:47 13 either.

16:47:50 14 So the only evidence, is Bob not aware of how
16:47:56 15 these things are reported? Sure, he's not, you know, a
16:48:03 16 numbers guy, but, come on, he's not acting as an accountant.

16:48:06 17 Remember when I asked John Depman? I said, is
16:48:09 18 Bob Harra the guy you go to to verify these numbers? He
16:48:12 19 laughed. Remember when I asked Ellen Roberts, and I said,
16:48:15 20 Ms. Roberts, did you ever go to Bob Harra to verify the
16:48:20 21 numbers reported? No.

16:48:22 22 Who was the final word? Ted Cecala. And, by
16:48:26 23 the way, you know, about all these people that report to
16:48:28 24 Mr. Harra. Please don't forget this. Mr. Kravetz alluded
16:48:31 25 to this. During 2009 and '10, during this conspiracy,

16:48:35 1 everybody, Mr. Harra and Mr. Gibson and Mr. North reported
16:48:41 2 to Ted Cecala. They did not report to Bob Harra. So I hope
16:48:47 3 that you don't say, gosh, well, he's the president, and
16:48:51 4 Mr. Kravetz said, oh, you know, he's the top dog, you know,
16:48:55 5 how can he not know?

16:48:57 6 Mr. North, Mr. Gibson did not report to Bob.

16:49:05 7 They reported to Mr. Cecala. And guess who Bob reported to?
16:49:09 8 Mr. Cecala, the final word on numbers. There's no evidence
16:49:16 9 that Bob was down there knowing what the regulations are.

16:49:27 10 Let me show you another document. All right.

16:49:36 11 This is the first document I showed, but this is during the
16:49:42 12 target exam. So look at the date. Do you remember the
16:49:45 13 first one was April 13, 2010. Now I'm looking at the
16:49:53 14 July 9, 2010. So it's said again. Right? So don't tell me
16:49:58 15 I just saw some document once, I didn't read it. Look.
16:50:01 16 Look at -- I'm zooming in. I'm turning around. I should be
16:50:05 17 looking at you.

16:50:05 18 Look at the bottom. It's the Federal Reserve
16:50:11 19 document. It's Bates stamped. They have that. They have
16:50:15 20 it again. It's in their files.

16:50:19 21 Now, you know, I want to read to you, I just
16:50:31 22 mentioned that there's not one document that says don't do
16:50:37 23 this, it's the wrong way to report it. All right? Because
16:50:43 24 you've got to have that criminal intent to say what I know
16:50:46 25 I'm doing is wrong, and it's not one witness that says that.

16:50:52 1 **Not one.**

16:50:55 2 Let me read you another quote from Mr. Corkery.

16:51:01 3 The bank provided the Fed with notice in writing of its

16:51:05 4 waiver practice, did it not?

16:51:07 5 **Yes.**

16:51:10 6 That's another quote. Conceal the waiver

16:51:13 7 practice. That's his testimony. That's the bank examiner's

16:51:20 8 testimony. Are we here to talk about concealing the waiver

16:51:23 9 practice? They provided notice.

16:51:26 10 That's the Government's witness. And

16:51:29 11 Mr. Corkery is a good man. Nobody is here to cast

16:51:33 12 aspersions, but the stakes are high here to say, oh, my

16:51:38 13 gosh, you concealed this? How can they say they concealed

16:51:40 14 it when the Fed had it in their files, and then you've got

16:51:44 15 Mr. Corkery up here saying, it wasn't concealed.

16:51:47 16 Now, the Government said in their opening some

16:51:53 17 things that I just want to challenge them on, and I'm not

16:51:57 18 going to -- a guy whom I loved, represented for years, and

16:52:04 19 I'm not going to mention his name, but he was a famous boxer

16:52:07 20 who used to say, Mike, if you are going to talk the talk,

16:52:12 21 you'd better walk the walk. A lot of people say that, but

16:52:16 22 he said it all the time.

16:52:17 23 And in the opening, the Government said that the

16:52:23 24 defendants came up with the waiver practice to hide loans.

16:52:29 25 They said also, they made up their own rules. They came up

16:52:33 1 with a new scheme.

16:52:37 2 We didn't come up with a waiver practice. Is

16:52:45 3 28 years coming up with something new? You're the

16:52:47 4 decision-maker. I say not.

16:52:49 5 Rich Conway said 28 years in good times and in

16:52:53 6 bad, and it was a decades old -- they showed you a couple

16:53:00 7 e-mails saying, yes, a decades old problem. You've got all

16:53:03 8 of those matured loans. What do you do with this? Tosha

16:53:05 9 Styles said it was a longstanding practice. That's her

16:53:08 10 word, practice.

16:53:08 11 She also said the process stays the same. Steve

16:53:13 12 Cummings said the same thing. But I hope you remember this,

16:53:17 13 that that practice was in effect from the testimony

16:53:23 14 28 years.

16:53:23 15 Now, let me ask you this: If you want to

16:53:26 16 conceal something, do you keep doing it the same way you've

16:53:32 17 been or do you change it? I want to talk tomorrow about,

16:53:37 18 you know, the bank gave the Fed this issue 220 document.

16:53:44 19 That's the audit committee of the board, high level. Gave

16:53:48 20 it to the Fed. They got it. That went to the audit

16:53:51 21 committee of the board.

16:53:53 22 They also gave the Fed, you will hear about

16:53:58 23 tomorrow, loan files that the Fed actually picked up, and

16:54:03 24 you're going to hear tomorrow about Mr. Fomunyam and

16:54:06 25 Mr. Corkery, the loan files that they actually reviewed, and

16:54:10 1 they admitted that they reviewed. Right? And those showed
16:54:13 2 the maturity date and they showed it was like thirty-some
16:54:16 3 million. And then they are reporting eight million, like,
16:54:20 4 aha, okay.

16:54:21 5 But I'm also going to talk about this ALERT
16:54:23 6 data, this spreadsheet that had all the details of like
16:54:27 7 8,000-some loans. Had it all there. You know, I heard
16:54:32 8 Mr. Kravetz say, yes, well, Mr. Corkery didn't read it and,
16:54:35 9 you know, too cumbersome or whatever it was. I reviewed it
16:54:41 10 for form, not substance. But guess what? They had it.

16:54:45 11 So I want you to remember those three things,
16:54:49 12 the issue 220, the loan files that they had and the
16:54:52 13 spreadsheet.

16:54:52 14 But here's my point, and maybe I will end on
16:54:55 15 this point if it's okay with Your Honor. If you wanted to
16:54:58 16 conceal something, when the Government asked for those
16:55:02 17 spreadsheets, and, you know, oh, well, we don't look at that
16:55:07 18 stuff. Why did you ask for it? They asked for it. If you
16:55:10 19 wanted to conceal something, you would have gone in there
16:55:13 20 and you would have said, oh, let me change this. Let me
16:55:17 21 change that. They gave it to them. They gave it to them.
16:55:22 22 Is that concealment? Is that concealment?

16:55:26 23 So I will come back tomorrow and I won't keep
16:55:29 24 you that much longer, and I hope you are not mad at me for
16:55:34 25 keeping me close to the end. It's high stakes here.

1 Fifteen, I hate to say it, 15 felonies against this man, but
2 I will finish up pretty quickly tomorrow. And at the end of
3 tomorrow I will show you that the Government has failed in
4 their proof, in their burden of proving that this man ever
5 for an instant intended to do something wrong.

6 Thank you very much, and don't leave, because
7 I will be back tomorrow. I want you in the same seats.
8 Okay?

9 THE COURT: All right. Thank you, Mr. Kelly.
10 So, members of the jury, I will let you go in
11 just a moment.

12 One thing that I am -- can you just hold on a
13 second?

14 So what I would like to do is tomorrow, because
15 I really would like to make sure we get all the closing
16 arguments and the end of my charge in and so that the case
17 is given to you tomorrow -- it may be given to you too late
18 in the day for you to do anything about it, but to make sure
19 that we aren't still arguing on Wednesday morning, I'm going
20 to cut the lunch hour down to a half-an-hour, but the
21 Government will provide you with the lunch. And so my
22 assistants, who you all know, will have some menus from one
23 of our favorite local places and lunch, you'll have a chance
24 to order whatever it is. And so we're still going to start
25 at 9:00 o'clock.

16:57:27 1 And I guess the other thing is, in terms of once
16:57:32 2 you do get the case to deliberate, how late you're going to
16:57:35 3 stay, that is going to be up to you. The basic rule is as
16:57:39 4 today, if one of you have -- you know, it's whoever -- I
16:57:46 5 mean, you kind of set your own schedule once you start
16:57:49 6 deliberating, but if you want to go beyond 5:00 o'clock and
16:57:52 7 it's agreeable to all of you, you can do that. If it's not
16:57:54 8 agreeable to all of you, then you will finish at
16:57:57 9 5:00 o'clock.

16:57:57 10 So two things between now and tomorrow morning,
16:58:02 11 which is, don't talk to each other about the case. Don't
16:58:07 12 talk to anyone else about the case. Don't let anyone talk
16:58:09 13 to you about the case.

16:58:11 14 You'll have it to deliberate amongst yourselves
16:58:14 15 soon enough, but no deliberation until the lawyers have
16:58:19 16 finished arguing, I've finished charging, and you have the
16:58:21 17 case, which hopefully will be towards the end of the day
16:58:25 18 tomorrow.

16:58:25 19 The second thing is, still, don't use electronic
16:58:30 20 resources or anything else to look up anything about the
16:58:33 21 case. Make sure that in terms of evidence, it's closed.
16:58:40 22 You have all the evidence you're going to have. In terms of
16:58:42 23 argument, I'm going to keep an open mind. Do listen to
16:58:50 24 whatever you are told tomorrow, but don't do any research
16:58:53 25 to try to find out something that you have a curiosity

16:59:00 1 about.

16:59:01 2 All right. I think that's it. Make sure you
16:59:03 3 are here and ready to go at 9:00 o'clock. Thank you very
16:59:05 4 much.

16:59:05 5 (The jury was excused for the evening recess.)

16:59:29 6 THE COURT: All right. So we'll meet tomorrow
16:59:42 7 morning at 8:30 to see whatever it is we've learned about
16:59:49 8 what Mr. Kravetz said, and if when you get the transcript
16:59:53 9 tonight you think there's something that, that there's some
16:59:58 10 curative instruction that I need to make, I would certainly
17:00:01 11 consider it to be a good thing if somebody e-mailed me the
17:00:07 12 proposed curative instruction before 8:30 a.m. tomorrow
17:00:09 13 morning. I don't really care whether it's 8:00 a.m.
17:00:13 14 tomorrow morning or sometime tonight, but let me know what
17:00:17 15 you have in mind and let the Government know, too. All
17:00:19 16 right?

17:00:20 17 MR. NOWAK: Yes, Your Honor.

17:00:21 18 MR. KRAVETZ: Your Honor, another application
17:00:23 19 for tomorrow going forward.

17:00:24 20 We would request that counsel be precluded from
17:00:27 21 referencing the high stakes of what's at issue here. It
17:00:32 22 comes very close to referencing punishment. If it happened
17:00:37 23 once, it wouldn't be as much, but it happened three times
17:00:40 24 during the closing.

17:00:41 25 THE COURT: Well, I think this was in

17:00:43 1 permissible bounds, so I'm going to deny that.

17:00:47 2 All right. Is there anything else?

17:00:49 3 MR. KRAVETZ: No, Your Honor.

17:00:49 4 MR. DALTON: No, Your Honor.

17:00:50 5 THE COURT: Okay. See you all tomorrow morning

17:00:52 6 at 8:30.

17:00:55 7 Actually, yes. See you tomorrow morning at

17:01:00 8 8:30.

17:01:10 9 Actually, I knew there was something else. I

17:01:14 10 sent out a verdict form over the weekend. I'm going to put

17:01:17 11 that in production tomorrow because I'm going to hand it to

17:01:20 12 the jury whenever I get to the end of my charge.

17:01:23 13 I take it if there's somebody who has seen

17:01:25 14 anything on the verdict form they want to bring to my

17:01:27 15 attention, at least mention it tomorrow morning at 8:30.

17:01:31 16 Okay? Otherwise, it's going as it is.

17:01:33 17 MR. KRAVETZ: Yes, Your Honor.

17:01:34 18 THE COURT: All right.

17:02:13 19 (Court recessed 5:02 p.m.)

17:02:13 20 - - -

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